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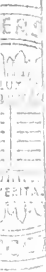
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# Indiana Law Review

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Volume 10

1976-1977

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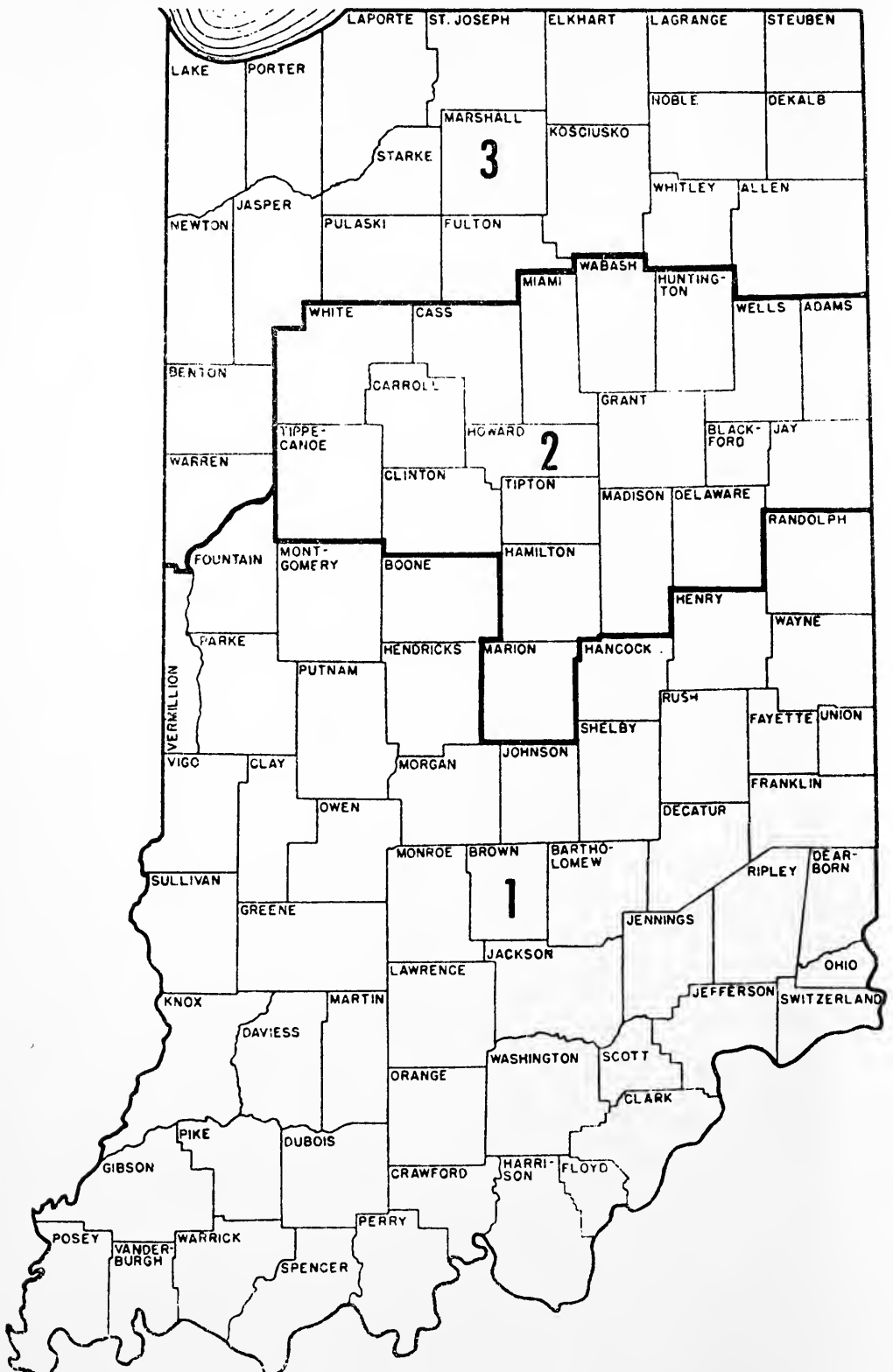
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# Indiana Law Review

Volume 10

1976

Number 1

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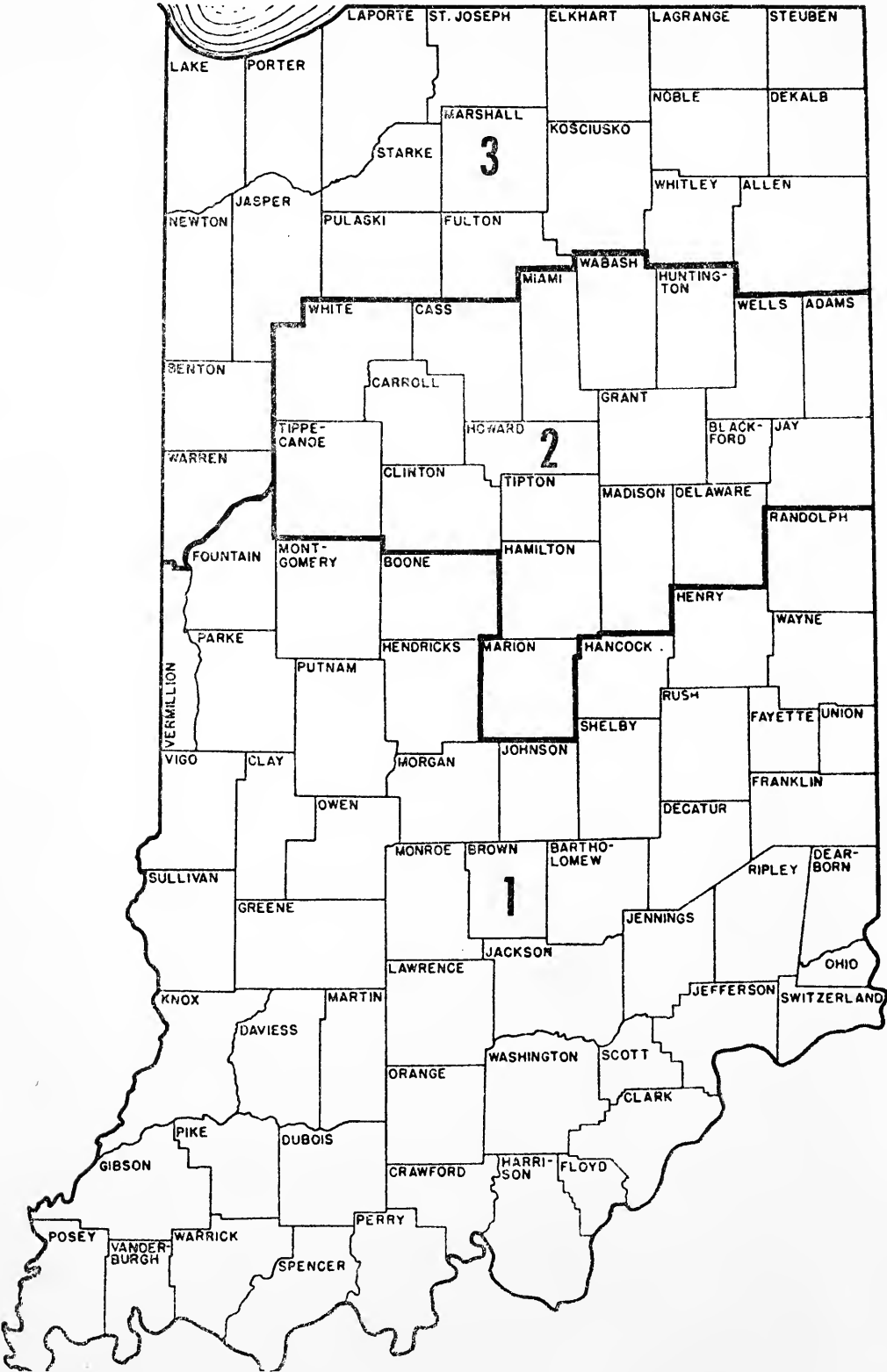
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Districts of the Indiana Court of Appeals



# Indiana Law Review

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Volume 10

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## Survey of Recent Developments in Indiana Law

The staff of the *Indiana Law Review* is pleased to publish its fourth annual Survey of Recent Developments in Indiana Law. This survey covers the period from June 1, 1975, through May 31, 1976. It combines a scholarly and practical approach in emphasizing recent developments in Indiana case and statutory law. Selected federal statutory developments are also included. No attempt has been made to include all developments arising during the survey period or to analyze exhaustively those developments that are included.

### I. Foreword: Indiana's Bicentennial Criminal Code

*William A. Kerr\**

After a six year period of study and debate, Indiana has finally joined the growing number of states that have recently revised and modernized their criminal codes.<sup>1</sup> Although not planned as a bicentennial project, the state's new criminal code was enacted, appropriately enough, during the celebration of the nation's bicentennial.<sup>2</sup> The project began in April of 1970 when the Indiana

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\*Professor, Indiana University School of Law—Indianapolis; Executive Director, Indiana Judicial Center; Member and Secretary of the Indiana Criminal Law Study Commission and the Criminal Code Interim Study Commission; LL.M., Harvard University, 1958.

<sup>1</sup>Other states which have recently enacted new or revised criminal codes include the following: Iowa [4 IOWA LEGISLATIVE SERV. 577-776 (1976); (Iowa Criminal Laws, Senate File 85), effective Jan. 1, 1978]; Kentucky [KY. REV. STAT. ANN. §§ 500-34 (1975), effective Jan. 1, 1975]; Ohio [OHIO REV. CODE ANN. §§ 2901-2929 (Page 1975), effective Jan. 1, 1974]; Pennsylvania [18 PA. CONS. STAT. ANN. §§ 101-7504 (1973), effective June 6, 1973]; Texas [TEX. PENAL CODE ANN., § 1.01-47.09 (Vernon 1974), effective Jan. 1, 1974]; and Washington [WASH. REV. CODE §§ 9A.04.010-9A.88.100 (1976), effective July 1, 1976].

<sup>2</sup>See Pub. L. No. 148, 1976 Ind. Acts. 718.

Criminal Law Study Commission was created,<sup>3</sup> and it continued for the next six years as the commission prepared first a proposed procedural code and then a new substantive code.

Work was begun in 1970 on both the procedural and the substantive codes, but the procedural code was completed first and was submitted to the Indiana General Assembly in 1973. The General Assembly enacted only approximately one third of the proposed code, however, because of opposition that developed to the remaining sections which proved to be highly controversial.<sup>4</sup> The substantive code was completed and was submitted to the General Assembly in 1975, but the legislators deferred action on it for one year to permit further study and review. Finally, the proposed code was enacted in 1976, but only after numerous revisions in the code as prepared by the Study Commission, including a major rewriting of the sentencing provisions. Furthermore, the code was enacted only after the legislature decided to defer its effective date until July 1, 1977, to permit another year of study and time for the legislature to make any additional revisions found to be necessary. An interim study commission was appointed after the enactment of the code, and it is currently working on a report which will be submitted to the General Assembly in 1977.

As enacted, the new substantive code consists of eight parts or divisions, entitled "Articles." The first article (article 41) covers general matters such as jurisdiction, culpability, defenses, and bars to prosecution, and the last article (article 50) contains sentencing provisions. The remaining articles set forth various crimes and offenses grouped into six general categories, including offenses against the person (article 42), offenses against property (article 43), offenses against public administration (article 44), offenses against public health, order, and decency (article 45), miscellaneous offenses (article 46), and offenses involving controlled substances (article 48).

#### A. *General Substantive Provisions (Article 41)*

##### 1. *Culpability*

One of the most confusing aspects of Indiana's criminal statutes has been the use of terms such as "intentionally," "knowingly," "wilfully," and "recklessly" to denote the requisite degree

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<sup>3</sup>The Indiana Criminal Law Study Commission was created in April 1970 by an Executive Order of the Governor and was funded by the State of Indiana and the Law Enforcement Assistance Administration through the Indiana Criminal Justice Planning Agency.

<sup>4</sup>*Compare* INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA CODE OF CRIMINAL PROCEDURE: PROPOSED FINAL DRAFT (1972), with Pub. L. No. 325, 1973 Ind. Acts 1750.

or degrees of culpability for offenses. The drafters of the new code attempted to overcome this confusion by using only the terms "intentionally," "knowingly," and "recklessly" to specify degrees of culpability, by including definitions for each of these terms,<sup>5</sup> and by clearly stating the requisite degree or degrees of culpability in the definition of each offense. This effort should help to clarify the confusion that has existed, but it will probably not eliminate all of the confusion because of the difficulty involved in defining the terms. For example, "knowingly" is defined to include conduct engaged in by a person who "is aware of a high probability that he is doing so."<sup>6</sup> Likewise "recklessly," as defined, includes a reference to a "gross deviation from acceptable standards of conduct." Undoubtedly, there will be much debate and litigation concerning such definitions and the Indiana appellate courts will have to clarify the terms on a case-by-case basis.

## 2. Defenses

Ten specific defenses are grouped together in one chapter of the first article of the new code, but there is no provision stating that these are or are not to be considered the only possible defenses in criminal cases. An indication that the listing of defenses is not to be considered exclusive, however, may be drawn from the fact that the legislature revised the recommendation of the Study Commission in a different section and explicitly created an eleventh defense. In defining a voluntary act, the commission stated that possession "is a voluntary act if the offender was aware of his control thereof for a sufficient time to have been able to terminate his possession."<sup>8</sup> The legislature revised this to state that "it is a defense that the person who possessed the

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<sup>5</sup>See IND. CODE § 35-41-2-2 (Burns Supp. 1976). [Citations herein to IND. CODE are to Burns' Code Edition of *Indiana Statutes Annotated*. Those sections which have been repealed effective July 1, 1977, are so designated; all sections cited to "Burns Supp. 1976" are from the new code and are effective July 1, 1977.]

In its proposed version, the commission also included a definition for the term "wilfully." The commission recommended that the term "wilfully" be read into any statute enacted without a provision concerning either a degree of culpability or strict liability and that "wilfully" should be defined to include conduct engaged in intentionally, knowingly, or recklessly. This provision was omitted by the General Assembly. See INDIANA CRIMINAL LAW STUDY COMMISSION, INDIANA PENAL CODE: PROPOSED FINAL DRAFT 13 (1974) [hereinafter cited as PENAL CODE: PROPOSED FINAL DRAFT].

<sup>6</sup>IND. CODE § 35-41-2-2(b) (Burns Supp. 1976).

<sup>7</sup>*Id.* § 35-41-2-2(c).

<sup>8</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 11.

property was unaware of his possession for a time sufficient for him to have terminated his possession.”<sup>9</sup>

Of the eleven defenses included in this first article, two (use of force to protect person or property and the insanity defense) will probably require immediate amendments before the code is to become effective and a third (avoidance of greater harm) may be sufficiently controversial to require a revision or complete elimination. Only three (unknowing possession, legal authority, and intoxication) would probably be considered noncontroversial. The other five defenses will probably not be revised by the legislature but do make significant changes in the existing law or raise serious questions of interpretation.

*a. Defense of person or property*—Various provisions concerning the defense of persons and property are grouped together in the new code. Three specific provisions relate to the use of force to protect a person, a dwelling, or property other than a dwelling.<sup>10</sup> Although these provisions generally reflect existing law in Indiana, a major change is included in the provision concerning the defense of a person.

Under a statute enacted in 1971, a person was authorized to defend “himself or his family by reasonable means necessary” or when going to the aid of another person “whom he reasonably believes to be in imminent danger of or the victim of aggravated assault, robbery, rape, murder or other heinous crime.”<sup>11</sup> This statute raised certain procedural questions,<sup>12</sup> but it also confused the nature of self-defense in Indiana. The statute clearly extended the right of a person to act on the mistaken belief that another person was in imminent danger but limited that right to certain specified offenses. At the same time, the statute could be interpreted as limiting the right of a person to defend himself or his family to those cases in which harm was actually threatened. The new code eliminates the confusion by providing that a person may defend himself or any other person when acting on a reasonable although mistaken belief that harm is being threatened.<sup>13</sup> The provision makes no distinction concerning the nature of the crime or offense being threatened except with reference to the right to use deadly force. In this regard, the code provides that deadly force

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<sup>9</sup>IND. CODE § 35-41-2-1(b) (Burns Supp. 1976). The code also includes special defenses with reference to child molesting (*id.* § 35-42-4-3) and bigamy (*id.* § 35-46-1-2).

<sup>10</sup>*Id.* § 35-41-3-2.

<sup>11</sup>*Id.* § 35-13-10-1 (Burns 1975) (repealed effective July 1, 1975).

<sup>12</sup>See *Loza v. State*, 325 N.E.2d 173 (Ind. 1975).

<sup>13</sup>IND. CODE § 35-41-3-2(a) (Burns Supp. 1976).



may be used only to prevent serious bodily injury or the commission of a forcible felony.

The latter limitation reflects existing law and undoubtedly was an implied limitation upon the 1971 statute, but the code contains an inconsistency with reference to deadly force that should be amended by the legislature before the code takes effect. In the section discussed above concerning the defense of persons and in the later section concerning defense of property other than a dwelling, specific provisions are included concerning the right to use deadly force.<sup>14</sup> No reference is made to deadly force, however, in the section concerning defense of a dwelling. This section provides instead for the use of force "that creates a substantial risk of serious bodily injury."<sup>15</sup> As defined in the definitions section, "serious bodily injury" includes an injury that "causes death," and therefore the term may in fact be the same as "deadly force." Nevertheless, the section should be amended to remove any doubt and to make the three sections consistent, especially since deadly force is authorized with reference to property other than a dwelling.<sup>16</sup>

b. *Insanity*—. One of the most controversial provisions in the new code is the section referring to the defense of insanity, and an amendment will undoubtedly be required to remove the confusion. The code simply provides that it is a defense that a person "lacked culpability as a result of mental disease or defect."<sup>17</sup> This provision, at first reading, unfortunately appears to adopt the *Durham* rule concerning insanity<sup>18</sup> and to reject the current defense in Indiana which is based on the recommendation of the American Law Institute.<sup>19</sup> Despite this appearance, this was clearly not the intent of the Criminal Law Study Commission. Although inartfully worded, the provision was intended merely to recognize the existence of an insanity defense and to leave the definition of the defense to the appellate courts. As stated in the

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<sup>14</sup>*Id.* § 35-41-3-2(a) and (c).

<sup>15</sup>*Id.* § 35-41-3-2(b).

<sup>16</sup>The term "deadly force" was used by the Study Commission in all three sections. See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 30-36.

<sup>17</sup>IND. CODE § 35-41-3-6 (Burns Supp. 1976).

<sup>18</sup>See *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954): "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." *Id.* at 874-75.

<sup>19</sup>See *Hill v. State*, 252 Ind. 601, 251 N.E.2d 429 (1969): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to *appreciate* the wrongfulness of his conduct or to conform his conduct to the requirements of law." *Id.* at 614, 251 N.E.2d at 436 (court's emphasis).

commission's commentary, "The law of insanity is entirely a subject of case law in Indiana. No attempt is made to codify it."<sup>20</sup> In view of the confusion created by this section, the legislature should amend it by substituting the language of the American Law Institute recommendation which is currently the law in Indiana.

c. *Avoidance of greater harm*—. A completely new defense was created by the legislature when it adopted, in a revised form, the Study Commission's recommendation concerning the "avoidance of greater harm."<sup>21</sup> The provision is essentially the result of an effort to draft a defense excusing a person who, because of necessity, commits what would otherwise be a criminal act. The provision, however, reflects the difficulty in drafting such a defense. The section first apparently authorizes a person to weigh the anticipated results of his conduct and to violate the law if he reasonably believes that his conduct would prevent harm that would be greater than the harm resulting from his conduct. The section then makes an exception with reference to the prevention of harm that is "social or moral harm."<sup>22</sup> Nowhere in the code is there a definition of "social or moral harm." The difficulty of stating this defense is emphasized by the fact that the legislature changed the language that was recommended by the Study Commission in this regard. The commission's version provided that "the necessity of such conduct shall not rest upon considerations of morality or the social policy of the penal statute defining the offense."<sup>23</sup> Although the legislature may have considered that its revised language made no substantive change in the defense as proposed by the commission, the two versions do appear to be substantially different. In view of the difficulties suggested by this provision, it might be better to repeal the section completely and rely upon the exercise of prosecutorial discretion to excuse those persons who may, on occasion, be compelled to act out of necessity.

d. *Use of force relating to an arrest*—. The code modifies the existing law in Indiana and provides that a citizen may use force to make an arrest only with reference to felonies. Furthermore, the citizen may not use deadly force even with reference to felonies except in self-defense.<sup>24</sup> This change may be relatively unimportant because it applies only to arrests by citizens which may rarely occur, but the same section also appears to limit the use of force by a law enforcement officer who makes an arrest.

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<sup>20</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 28.

<sup>21</sup>IND. CODE § 35-41-3-4 (Burns Supp. 1976).

<sup>22</sup>*Id.*

<sup>23</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 41.

<sup>24</sup>IND. CODE § 35-41-3-3(a) (Burns Supp. 1976).

Under this section, an officer may use force to make an arrest but may use "force that creates a substantial risk of serious bodily injury" only with reference to felonies or in self-defense or defense of another person. If this type of force is different from "deadly force," then an officer's authority to make an arrest has been limited by the legislature. As discussed above, the terms probably have the same meaning, but the provisions should be amended to remove any doubt. The section also provides that a person may use force to resist an arrest, but "only if the arrest is clearly unlawful."<sup>25</sup> This section represents a change from the provisions recommended by the Study Commission. According to the commission's proposed version, a person may not use force to resist any arrest which he knows is being made by an officer nor use force to resist an arrest by a private citizen unless the arrest is clearly unlawful.<sup>26</sup> As enacted, no distinction is made between an arrest by an officer and an arrest by a private citizen. Unfortunately, the code contains no guidelines for determining when an arrest is or is not "clearly unlawful," but this may reflect the commission's conclusion that there is no practical way to provide such guidelines. If so, then the appellate courts will have to develop appropriate guidelines because this provision clearly invites litigation.

*e. Mistake of fact*—A relatively short provision in the new code sets forth a defense that appears to be carefully drafted but in fact raises a number of serious questions. A mistake of fact is recognized as a valid defense, and the provision requires that the mistake be reasonable and negate the culpability required for the offense involved.<sup>27</sup> Both of these limitations appear to be appropriate, but it has been contended that the defense is more properly based on the existence of an "honest mistake" rather than a "reasonable mistake."<sup>28</sup> A more serious question is raised, however, by the fact that the code makes no reference to a defense based on a mistake of law. This might suggest that there is to be no defense based upon a mistake of law, but the code contains no statement that the codified defenses are considered to be exclusive, as noted above. Therefore, the possibility exists that a defense of mistake of law will be recognized by the courts in an appropriate case.<sup>29</sup> On the other hand, if the defense of mistake of fact is to be exclusive, then the provision gives no guidance for

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<sup>25</sup>*Id.* § 35-41-3-3(f).

<sup>26</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 38.

<sup>27</sup>IND. CODE § 35-41-3-7 (Burns Supp. 1976).

<sup>28</sup>W. LAFAYE & A. SCOTT, CRIMINAL LAW 356-58 (1972).

<sup>29</sup>For examples of possible cases, *see id.* at 362-68.

distinguishing a matter of fact from a matter of law. For example, is it a mistake of law or a mistake of fact which excuses a person from a statutory registration requirement when the person is unaware of the statutory requirement?<sup>30</sup> Likewise, is it a mistake of law or a mistake of fact that excuses a person who improperly takes property under the mistaken belief that he has the right to do so?<sup>31</sup>

*f. Duress*—The defense of duress has been recognized in Indiana<sup>32</sup> and is codified in the new code. All offenses against the person are specifically excepted from this defense, and therefore the drafters of the code have indicated that even a minor offense against a person is to be considered more harmful than even the most serious threat of harm that is posed to the person claiming the defense of duress. Thus this section operates as a limitation on the defense of avoidance of greater harm, assuming that the General Assembly retains that defense, so that a person who claims the defense of duress could not weigh the nature of the harm to be inflicted by him on an innocent victim against the nature of the harm threatened against himself or another person.

The provision does pose a question of interpretation, however, because of a difference between the defense as enacted by the General Assembly and the version recommended by the Study Commission. In order to clarify the Indiana law, the commission included a provision expressly rejecting any defense of coercion based solely upon a marital relationship.<sup>33</sup> This provision was eliminated by the General Assembly, apparently on the assumption that the provision was unnecessary, but the defense apparently still exists in Indiana<sup>34</sup> and it might still be recognized under the code if it is finally decided that the codified list of defenses is not exclusive.

*g. Entrapment*—As codified, the defense of entrapment may be substantially different from the defense of entrapment as it has been developed by the Indiana appellate courts. The code emphasizes that entrapment has two distinct elements, inducement by a public agent and a predisposition by the suspect involved.<sup>35</sup> Whereas the Indiana Supreme Court has suggested at times that inducement can be shown by even a limited amount of

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<sup>30</sup>See *Lambert v. California*, 355 U.S. 225 (1957).

<sup>31</sup>See IND. CODE § 35-17-5-7 (Burns 1975) (repealed effective July 1, 1977).

<sup>32</sup>*Hood v. State*, 313 N.E.2d 546 (Ind. Ct. App. 1974).

<sup>33</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 42.

<sup>34</sup>See *McCoy v. State*, 241 Ind. 104, 170 N.E.2d 43 (1960).

<sup>35</sup>IND. CODE § 35-41-3-9 (Burns Supp. 1976).

activity by the public agent,<sup>36</sup> the code emphasizes that the offense must be the "product of a public servant using persuasion or other means likely to cause the person to engage in the conduct."<sup>37</sup> With regard to both the inducement and the predisposition, the code also contains the provision that conduct "merely affording a person an opportunity to commit the offense does not constitute entrapment."<sup>38</sup> These provisions thus suggest that entrapment would not occur unless the public agent engaged in a substantial amount of activity to persuade or cause a suspect to commit an offense. In addition, the code makes no reference to the special rule being developed in Indiana that requires an officer to have some basis for suspecting a person of illegal activity before "baiting" a trap.<sup>39</sup> This may indicate a legislative intent to eliminate this special Indiana limitation on the defense of entrapment, although it may be argued that the requirement is a procedural matter which is ultimately to be decided by the Indiana appellate courts.

*h. Abandonment*—. In order to clarify a defense which has not been given much consideration by the Indiana courts,<sup>40</sup> the drafters of the code set forth the requirements for the defense of abandonment as applied to aiding and abetting, attempts, and conspiracy.<sup>41</sup> With respect to aiding and abetting and attempts, a person has a defense if he either abandons his efforts or prevents the commission of the crime. On the other hand, a person has a defense to conspiracy only if he prevents the commission of the crime intended. This defense may be justified by a social policy that would encourage persons to refrain from continuing their criminal conduct, but the defense is of a nature completely different from the other defenses included in the code. Whereas the other defenses are based upon some justification or excuse for the person's commission of an otherwise criminal act, the defense of abandonment may operate to relieve a person of criminal liability because of the person's conduct subsequent to the time that the person has in fact completed the criminal act. If the person has taken a substantial step toward the commission of a particular crime, that person may have actually committed the crime of at-

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<sup>36</sup>See *Smith v. State*, 258 Ind. 415, 281 N.E.2d 803 (1972), and *Gray v. State*, 249 Ind. 629, 231 N.E.2d 793 (1967). *But cf.* *Thomas v. State*, 345 N.E.2d 835 (Ind. 1976).

<sup>37</sup>IND. CODE § 35-41-3-9(a)(1) (Burns Supp. 1976).

<sup>38</sup>*Id.* § 35-41-3-9(b).

<sup>39</sup>See *Locklayer v. State*, 317 N.E.2d 868 (Ind. Ct. App. 1974). *See also* Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 186-87 (1975).

<sup>40</sup>See *Hedrick v. State*, 229 Ind. 381, 98 N.E.2d 906 (1951).

<sup>41</sup>IND. CODE § 35-41-3-10 (Burns Supp. 1976).

tempt as defined by the code.<sup>42</sup> Likewise, a person would be guilty of conspiracy if an overt act has occurred in furtherance of his unlawful agreement.<sup>43</sup> Instead of completely excusing a person from criminal liability once a crime has been committed, a more appropriate approach would seem to be a provision for the mitigation of punishment to be imposed if the person has taken steps to prevent or limit the harm that otherwise would have resulted from his criminal conduct.

### 3. *Bars to Prosecution*

The new code draws together various provisions of existing statutory and case law concerning limitations on prosecutions and clarifies a major question that has existed concerning prosecutions by the federal government. At common law, a prosecution in one jurisdiction would not necessarily bar a subsequent prosecution in another jurisdiction.<sup>44</sup> In order to change this rule, Indiana adopted a statute which barred prosecutions in Indiana subsequent to prosecutions in "another state, territory or country."<sup>45</sup> This statute, however, did not necessarily apply to prosecutions by the federal government, and the Federal Constitution has not been interpreted to prohibit subsequent state prosecutions.<sup>46</sup> Thus the Indiana statute was revised in the new code to provide that prosecutions "in any other jurisdiction" would bar subsequent prosecutions in this state.<sup>47</sup>

The new code does need further clarification, however, concerning its provisions that a prosecution is barred if the defendant has been prosecuted "for a different offense or for the same offense based on different facts" and the latter prosecution is "for an offense with which the defendant should have been charged in the former prosecution."<sup>48</sup> The code does not include any provisions concerning mandatory joinder, and mandatory joinder is not explicitly covered or fully developed by the provisions in the new procedural code.<sup>49</sup> In particular, the code does not appear to

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<sup>42</sup>*Id.* § 35-41-5-1.

<sup>43</sup>*Id.* § 35-41-5-2.

<sup>44</sup>*See* W. LAFAYE & A. SCOTT, CRIMINAL LAW 126-27 (1972).

<sup>45</sup>IND. CODE § 35-1-2-15 (Burns 1975) (repealed effective July 1, 1977).

<sup>46</sup>*See* *Bartkus v. Illinois*, 359 U.S. 121 (1959).

<sup>47</sup>IND. CODE § 35-41-4-5 (Burns Supp. 1976).

<sup>48</sup>*Id.* § 35-41-4-4.

<sup>49</sup>Mandatory joinder is apparently included in the procedural code by reference to two provisions which otherwise appear to relate only to permissive joinder. The procedural code provides that two offenses "can be joined in the same indictment or information" if based on the same conduct or on a series of related acts. IND. CODE § 35-3.1-1-9(a) (Burns 1975). The code further provides that such offenses, if charged in separate indictments

provide any guidelines concerning the developing collateral estoppel doctrine.<sup>50</sup>

#### 4. *Offenses of General Applicability*

Although the code organizes Indiana's crimes and offenses into five specific categories and includes an article for a group of miscellaneous offenses (article 46), two offenses are set forth in the first article because they may relate to any or all of the offenses in each of the other categories. These are the offenses of attempt<sup>51</sup> and conspiracy to commit an offense.<sup>52</sup>

One of the major changes in the entire criminal code is the new provision concerning attempts. Under existing law, Indiana has no general offense of attempting to commit a crime.<sup>53</sup> Therefore, a person may be prosecuted for an attempt only if there is a specific statute making it an offense to attempt to commit a particular offense. The inclusion of a general attempt statute in the new code is a distinct improvement over the existing law, but the provision, as ultimately enacted by the legislature, unfortunately severely limits the extent or scope of the offense. As recommended by the Study Commission, a person would have to commit an act or fail to do an act that would constitute a "substantial step toward the commission of the crime."<sup>54</sup> This was then revised by the legislature to provide that the person must commit a substantial step toward the commission of a crime "and the crime would have been consummated but for the intervention of, or discovery by, another person."<sup>55</sup> Persons who attempt to commit a crime and fail to do so because of some other reason, such as inaccurate aim or being frightened by a dog, would not be covered by this provision. An amendment is therefore necessary although it may be difficult for the members of the legislature to agree on the proper definition of a "substantial step." The offense, as defined,

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or informations, "shall" be joined together for trial only by the court upon motion of the defendant, the prosecuting attorney, "or on its own motion." *Id.* § 35-3.1-1-10(b). Under this latter provision, the court apparently has the responsibility to join such charges even if neither party requests joinder, but the possibility remains that the issue would be waived by a defendant's failure to make a joinder motion.

<sup>50</sup>*See Ashe v. Swenson*, 397 U.S. 436 (1970). *See also* Kerr, *Criminal Law and Procedure*, 1975 *Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 190-92 (1975).

<sup>51</sup>IND. CODE § 35-41-5-1 (Burns Supp. 1976).

<sup>52</sup>*Id.* § 35-41-5-2.

<sup>53</sup>*State v. Sutherland*, 228 Ind. 587, 92 N.E.2d 923 (1950).

<sup>54</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 68.

<sup>55</sup>IND. CODE § 35-41-5-1(a) (1) (Burns Supp. 1976).



also purports to eliminate one of the most confusing common law defenses, the defense of impossibility. According to the new code, a person who acts with the requisite intent or culpability is guilty of an attempt if he engages in conduct "that would constitute the crime if the attendant circumstances were as he believed them to be."<sup>56</sup> This language was recommended by the Study Commission, and the commentary accompanying the commission's proposal states that this provision was intended to reject the defense of impossibility.<sup>57</sup> Assuming that a person's actions and accompanying intent or guilty mind should be of more concern than the results of the person's conduct, the elimination of the defense does seem appropriate and does end the confusion in distinguishing between legal and factual impossibility as a defense.<sup>58</sup> At the same time, the provision is open to the objection that it now permits a person to be convicted of an attempt to commit a certain offense despite the fact that he could not be convicted of the intended offense even after completing every act that he intended to commit.

With regard to conspiracy, the new code restates much of the existing law but does make at least three major changes. The most obvious change is the addition of the requirement for an overt act. An "agreement" to commit an offense was the gist of the crime of conspiracy under the former statute,<sup>59</sup> but the new provision now makes the Indiana offense conform to that in other states and in the federal system.<sup>60</sup> The new code also provides that the offense of conspiracy is to be of the same class as the crime that the conspirators intended to commit. This provision therefore provides that the penalty for conspiracy is to be the same as for the crime intended to be committed whereas the penalty for conspiracy under existing law could be higher than the penalty for the crime intended.<sup>61</sup> Finally, the code provides that the offense of conspiracy includes a specific intent to commit the crime agreed upon by the conspirators. This change was apparently intended to protect a person who entered into an agreement for one purpose only to be charged thereafter for conspiring to commit a different offense, but it may have the effect of preventing prosecutions for conspiracy against persons who knowingly unite to violate laws

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<sup>56</sup>*Id.* § 35-41-5-1(a)(2).

<sup>57</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 69.

<sup>58</sup>*See* W. LAFAYE & A. SCOTT, CRIMINAL LAW 438-46 (1972).

<sup>59</sup>IND. CODE § 35-1-111-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>60</sup>18 U.S.C. § 371 (1970).

<sup>61</sup>*Lane v. State*, 259 Ind. 488, 288 N.E.2d 258 (1972).



generally without having taken the time to reflect specifically on the particular violation intended.<sup>62</sup>

*B. Offenses Against the Person (Article 42)*

*1. Homicide*

The organization or grouping of related offenses and the classification of offenses according to the seriousness of each offense are two of the major changes and improvements reflected in the new criminal code. Homicide, if not the most serious, is one of the most serious crimes and quite properly is placed at the beginning of the code.<sup>63</sup> It is grouped with other offenses against the person and the full range of felony classifications is reflected in its various provisions, ranging from a Class A to a Class D felony and including the capital felony category.

*a. Murder—* Murder, as defined, includes a number of changes from the existing law. The major change, however, is the elimination of the distinction between first and second degree murder. First degree murder has previously been defined as the killing of a human being purposely and with premeditated malice<sup>64</sup> whereas second degree murder was the killing of a human being purposely and maliciously but without premeditation.<sup>65</sup> Despite this clear definitional distinction, it has been difficult if not impossible to distinguish between the two degrees because of the view that premeditation can be proved even though there is no appreciable period of time between the forming of an intent to kill and the carrying out of that intent.<sup>66</sup> Under the new code, the two degrees of murder are abolished and murder is defined simply as the knowing or intentional killing of a human being. The offense is designated as a Class A felony with a determinate sentence of imprisonment for a period of from twenty to fifty years.<sup>67</sup> The murder definition also continues to include the felony-murder rule from the prior law but adds kidnapping and unlawful sexual deviate conduct to the prior list of arson, burglary, rape, and robbery.

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<sup>62</sup>The offense of conspiracy is still limited to agreements to commit a felony although the Study Commission recommended that the offense be changed to include misdemeanors. See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 69.

<sup>63</sup>IND. CODE § 35-42-1-1 (Burns Supp. 1976).

<sup>64</sup>*Id.* § 35-13-4-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>65</sup>*Id.* § 35-1-54-1.

<sup>66</sup>See *Sanders v. State*, 259 Ind. 43, 284 N.E.2d 751 (1972); and *May v. State*, 232 Ind. 523, 112 N.E.2d 439 (1953).

<sup>67</sup>IND. CODE § 35-50-2-4 (Burns Supp. 1976).

Capital murder provisions are included in the code,<sup>68</sup> but the provisions differ in a number of significant ways from the version that was enacted in 1973.<sup>69</sup> For example, the killing of a judge is now a capital offense. On the other hand, hijacking was eliminated from the list of capital offense provisions but was apparently intended to be included under the kidnapping provision since kidnapping was specifically redefined to include hijacking.<sup>70</sup> Kidnapping was continued in the list of capital offense provisions, but its redefinition, although expanded to include hijacking, was severely limited so as to exclude all but the most serious forms of kidnapping from the felony-murder rule. Finally, the legislature specifically provided that capital murder would include no other offenses. This follows the recommendation of the Study Commission<sup>71</sup> but represents a distinct change from the version enacted by the legislature in 1973 which specifically provided that an indictment for capital murder could not charge a lesser included offense but the defendant could be found guilty of second degree murder or manslaughter.<sup>72</sup> The capital murder provisions in the new code were enacted prior to the recent decisions of the United States Supreme Court concerning capital punishment,<sup>73</sup> and it is probable that those decisions will necessitate further amendments in this area before the code becomes effective.

*b. Manslaughter*—Manslaughter continues to be divided into the two degrees of voluntary and involuntary manslaughter, but involuntary manslaughter is divided into two distinct offenses. The offense of voluntary manslaughter appears to be substantially revised in the new code but it may not, in fact, have been changed to any great extent. Under the old definition, voluntary manslaughter was a voluntary killing without malice but in a sudden heat.<sup>74</sup> The offense now is defined as a knowing or intentional killing under an intense passion resulting from grave and sudden provocation.<sup>75</sup> This language could be interpreted to be essentially the same, but the difference in the use of the word "sudden" suggests the possibility of a change in the offense. Under the prior definition, the emphasis was upon a person who acted in a "sudden" heat whereas the new definition refers to a person

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<sup>68</sup>*Id.* § 35-42-1-1.

<sup>69</sup>*Id.* § 35-13-4-1(b) (Burns 1975) (repealed effective July 1, 1977).

<sup>70</sup>*Id.* § 35-42-3-2 (Burns Supp. 1976).

<sup>71</sup>See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 73.

<sup>72</sup>IND. CODE § 35-13-4-1(b) (Burns 1975) (repealed effective July 1, 1977).

<sup>73</sup>*Roberts v. Louisiana*, 96 S. Ct. 3001 (1976); *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976); *Gregg v. Georgia*, 96 S. Ct. 2909 (1976).

<sup>74</sup>IND. CODE § 35-13-4-2 (Burns 1975) (repealed effective July 1, 1977).

<sup>75</sup>*Id.* § 35-42-1-3 (Burns Supp. 1976).

acting under an intense passion caused by a "sudden" provocation. The latter definition thus might be interpreted to place a specific limitation on the time of the provocation that is not necessarily included in the earlier definition. Finally, the legislature added what appears to be a procedural provision in the section defining manslaughter, and it may well raise a serious question of interpretation. The legislature specifically provided that the state is not required to prove the existence of intense passion but that this is a mitigating factor which would reduce murder to voluntary manslaughter. Two issues are suggested by this language. If a defendant is charged with murder, this provision could be interpreted to require the defendant to prove the existence of intense passion in order to show voluntary manslaughter. Such a requirement would violate the Federal Constitution, and thus the provision can only be interpreted to mean that the defendant has the burden of going forward with some evidence of intense passion.<sup>76</sup> On the other hand, if a defendant is charged with voluntary manslaughter, the provision suggests that the state has no duty to prove the existence of intense passion even though voluntary manslaughter, by definition, appears to include the existence of intense passion as an element of the offense. Because this would be an illogical conclusion, the provision may mean that voluntary manslaughter is not to be charged directly as an offense but is only to be considered as a lesser included offense of a charge of murder.

Involuntary manslaughter, as proposed by the Study Commission, was essentially the same as under the prior law except that the commission recommended an added provision to include reckless homicide.<sup>77</sup> The legislature, however, made certain changes that may make the offenses different. The gist of the offense under the prior definition was the involuntary or unintentional killing of a human being during the commission of an unlawful act. As revised by the legislature, involuntary manslaughter is now simply the killing of a human being while committing an offense. In addition, the legislature accepted the recommendation of the commission but created a separate and distinct offense of reckless homicide, defined as the reckless killing of another human being.<sup>78</sup> With reference to both involuntary manslaughter and reckless homicide, the legislature provided for a reduced classification of the offense if the death was caused by an automobile. By apparently expanding involuntary manslaughter to

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<sup>76</sup>*Mullaney v. Wilbur*, 421 U.S. 684 (1975).

<sup>77</sup>*Compare* IND. CODE § 35-13-4-2 (Burns 1975) (repealed effective July 1, 1977) with PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 80.

<sup>78</sup>IND. CODE § 35-42-1-5 (Burns Supp. 1976).

include even intentional killings during the commission of any unlawful act, the legislature broadened a question that had already existed with reference to this offense. That question is whether or not the related unlawful acts are independent of or lesser included offenses of involuntary manslaughter. For example, if a victim is killed intentionally or unintentionally during the course of a rape, is the rape a lesser included offense of involuntary manslaughter? If so, would the proportionality provision of the Indiana Constitution<sup>79</sup> prevent the legislature from prescribing a greater penalty for rape than for involuntary manslaughter?<sup>80</sup> An amendment may be necessary to resolve this question. Finally, involuntary manslaughter, as newly defined, refers merely to a killing during an "offense" without defining the type or nature of the offense that is required for involuntary manslaughter. The Indiana appellate courts will therefore have to decide whether any and all misdemeanors and felonies are included, whether the term "offense" includes only offenses that are dangerous to life, and whether strict liability exists once an offense has been committed. Since the legislature substituted the word "offense" for the term "unlawful act" under the prior definition and created a specific offense of reckless homicide, it did, however, clarify one question that had existed with reference to the prior definition. The term "unlawful act" could be interpreted to mean not only a criminal offense but also a lawful act committed in an unlawful manner. By this definition, involuntary manslaughter could then include a killing during the commission of a lawful act that was committed negligently or recklessly.<sup>81</sup> The new code makes it clear that a killing during the commission of a lawful act is a punishable offense, provided that the act is done recklessly.

## 2. Battery and Related Offenses

A battery is defined in the new code as the knowing or intentional touching of a person in a rude, insolent, or angry manner.<sup>82</sup> The only change from the prior law is the substitution of "knowingly or intentionally" for the word "unlawfully."<sup>83</sup> Since intent may be inferred from rude, insolent, or angry conduct, this change may not be of any real substance, but the new emphasis on intent may tend to make proof of some batteries more difficult.

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<sup>79</sup>IND. CONST. art. 1, § 16.

<sup>80</sup>See Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 137, 167-68 (1974).

<sup>81</sup>See W. LAFAYE & A. SCOTT, *CRIMINAL LAW* 594-95 (1972). See also *Minardo v. State*, 204 Ind. 422, 183 N.E. 548 (1932).

<sup>82</sup>IND. CODE § 35-42-2-1 (Burns Supp. 1976).

<sup>83</sup>*Id.* § 35-1-54-4 (Burns 1975) (repealed effective July 1, 1977).

A significant change has been made in the name of the offense, however, because the offense is simply and properly called a "battery" whereas the offense was designated as an "assault and battery" in the previous statute.<sup>84</sup> The prior usage was a continual source of confusion because of the difficulty in distinguishing between an "assault" and an "assault and battery." The definitional distinction between the two offenses was clear, but the almost interchangeable usage of the word "assault" with reference to both offenses often made it difficult to know which offense was actually being discussed or considered. Although both terms will undoubtedly still be used for many years, this change should tend to reduce the usage and the resulting confusion. Furthermore, the new code purports to eliminate the offense of "assault" as a distinct offense, and this should eventually help to end the confusion of terminology.

Under the prior law, an assault was a specific offense involving an attempt, with present ability, to commit a violent injury upon a person.<sup>85</sup> No offense of assault is included in the new code, and the Study Commission's commentary suggests that an assault should be prosecuted under the general attempt statute as an attempt to commit a battery.<sup>86</sup> Despite this suggestion, the Study Commission recommended that the legislature create a new offense to be designated "reckless conduct." Under this recommended provision, a person would be guilty of reckless conduct if he "recklessly performs any act" that would create a substantial risk of bodily injury to another person.<sup>87</sup> To a limited extent, this offense was similar to the former offense of assault except that recklessness was required in the creation of the threat of harm. When the legislature enacted the provision, however, it inserted the words "knowingly or intentionally" and thus virtually reenacted an offense of assault except under a different name. Under this provision, a person who "recklessly, knowingly, or intentionally performs an act that creates a substantial risk of bodily injury to another person" commits the offense of recklessness.<sup>88</sup> Since "bodily injury" is defined to mean "any impairment of physical condition, including physical pain,"<sup>89</sup> the new offense appears to be the equivalent of the prior assault offense which involved an attempt to commit a violent injury upon another person.

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<sup>84</sup>*Id.*

<sup>85</sup>*Id.* § 35-13-4-7 (Burns 1975) (repealed effective July 1, 1977).

<sup>86</sup>See the Study Commission's commentary following the definition of battery, PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, Comments at 84.

<sup>87</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 84.

<sup>88</sup>IND. CODE § 35-42-2-2 (Burns Supp. 1976).

<sup>89</sup>*Id.* § 35-41-1-2.

In addition to these two basic offenses, the new code provides for increased penalties under various circumstances such as when the battery or recklessness results in serious bodily injury or is committed with a deadly weapon. These provisions should be amended, however, because there does not appear to be any correlation between the classifications for battery and for recklessness. For example, recklessness (which is defined to include knowing and intentional conduct) resulting in serious bodily injury is only a Class D felony whereas a battery resulting in serious bodily injury is a Class C felony.

### 3. *Kidnapping and Confinement*

Kidnapping has been a basic offense in Indiana through the years, but false imprisonment has not been recognized as an offense. The kidnapping statute did include a provision, however, making it an offense to imprison a person with the intent to have such person carried away.<sup>90</sup> In order to include false imprisonment as an offense, the Study Commission recommended that the term "kidnapping" be dropped and that a new offense of "unlawful confinement" be created to include both kidnapping and false imprisonment.<sup>91</sup> In its proposal, the commission included the recommendation that the offense include lack of consent as an element. The commission also made the controversial recommendation that there be four classes of the offense, ranging from a Class A felony to a Class D felony. In so doing, it recommended that the standard term of imprisonment for kidnapping be lowered from life imprisonment to a term of two to four years. It then recommended that the penalty be increased because of aggravating circumstances such as the use of a deadly weapon or the hijacking of a vehicle.

The commission's recommendation concerning the penalties was accepted by the legislature, but the legislature did not agree to drop the use of the term "kidnapping." As a result, the commission's recommendation was divided into two parts and the legislature enacted two separate offenses designated as "kidnapping"<sup>92</sup> and "confinement."<sup>93</sup> In so doing, the legislature drastically limited the scope of the kidnapping offense, including in it only the most aggravated forms of kidnapping such as kidnapping for ransom, kidnapping during a hijacking, or holding a person as a hostage. This was designated as a Class A felony, thereby

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<sup>90</sup>*Id.* § 35-1-55-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>91</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 86.

<sup>92</sup>IND. CODE § 35-42-3-2 (Burns Supp. 1976).

<sup>93</sup>*Id.* § 35-42-3-3.

changing the penalty from a term of life imprisonment (or even a death sentence with reference to a kidnapping for ransom<sup>94</sup>) to a fixed term of from twenty to fifty years. All other forms of kidnapping were included in the offense of "confinement" which was divided into three classes, ranging from a Class D felony to a Class B felony, depending on the existence of aggravating circumstances. For example, a person who "removes another person, by force or threat of force, from one place to another" commits a Class D felony.<sup>95</sup> This is punishable only by a term of imprisonment for a period of from two to four years. On the other hand, if a deadly weapon is used as the force or threat of force, the offense is a Class B felony. This is punishable by a term of from six to twenty years. In revising the commission's recommendation, the legislature also made one other major change. As enacted, lack of consent is an element of confinement when a victim is simply confined or falsely imprisoned, but lack of consent is not an element of confinement with reference to the moving of a victim from one place to another or of the newly defined offense of kidnapping.

#### 4. Rape

The most obvious change in the provision concerning rape is that it now permits either a man or a woman to be convicted of rape.<sup>96</sup> A much more significant change, however, is the lowering of the penalty for rape from a fixed term of two to twenty-one years to a fixed term of two to eight years except when force is used that creates a substantial risk of serious bodily injury. In that case, the penalty is a fixed term of from six to twenty years. Statutory rape has also been removed from the provisions concerning rape and is now included in the "child molesting" offense.

#### 5. Unlawful Deviate Conduct

One of the more controversial changes in the new code is the elimination of sodomy as a crime when committed by consenting adults. The term "sodomy" is dropped from the code which provides only for an offense designated as "unlawful deviate conduct."<sup>97</sup> This offense is essentially the same as the prior offense of sodomy except for the element of consent.<sup>98</sup>

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<sup>94</sup>*Id.* § 35-1-55-3 (Burns 1975) (repealed effective July 1, 1977).

<sup>95</sup>*Id.* § 35-42-3-3. (Burns Supp. 1976).

<sup>96</sup>*Id.* § 35-42-4-1.

<sup>97</sup>*Id.* § 35-42-4-2.

<sup>98</sup>*Id.* § 35-1-89-1 (Burns 1975) (repealed effective July 1, 1977).



### 6. *Child Molesting*

Three distinct offenses are grouped together under the child molesting offense, with different penalties being prescribed depending upon the age of the persons involved and the degree of force involved. These include statutory rape, unlawful deviate conduct, and lewd fondling or touching.<sup>99</sup> With regard to all three offenses, the legislature made a major change in the law by providing that it is a defense if the child has ever been married or if the older person involved reasonably believed that the child was sixteen years of age or older at the time of the act. Both defenses were added by the legislature and were not included in the Study Commission's recommendations.<sup>100</sup>

The provision concerning lewd fondling poses an additional issue which the Study Commission's recommendation would have helped to resolve to some extent but which is still in the provision as finally enacted. According to the new provision, a person sixteen years of age or older is guilty of child molesting if he fondles or touches a child under the age of sixteen with intent to arouse or satisfy the sexual desires of either person.<sup>101</sup> If this statute is valid, it suggests that a high school student could be found guilty of a felony for even slightly amorous conduct when on a date with a friend who is only days or weeks younger than he is. This is especially true in view of the general rule that the person under the age of consent cannot give a valid consent to the illegal touching.<sup>102</sup> Under the prior statute, the offense could be committed on a victim who was not yet seventeen years of age, but no age limit was specified for the offender.<sup>103</sup> The Study Commission recommended that the provision be revised to make it an offense for a person eighteen years of age or older to fondle or touch a person under the age of sixteen.<sup>104</sup> This might have helped to resolve the question because of the age differential and the greater likelihood that persons of those ages would not be dating each other, but the legislature decided not to follow this recommendation.

### C. *Offenses Against Property (Article 43)*

#### 1. *Arson and Mischief*

The offense of arson has been drastically altered from the of-

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<sup>99</sup>*Id.* § 35-42-4-3 (Burns Supp. 1976).

<sup>100</sup>See PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 91-92.

<sup>101</sup>IND. CODE § 35-42-4-3(d) (Burns Supp. 1976).

<sup>102</sup>See *Hamilton v. State*, 237 Ind. 298, 145 N.E.2d 391 (1957).

<sup>103</sup>IND. CODE § 35-1-54-4 (Burns 1975) (repealed effective July 1, 1977).

<sup>104</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 91.



fense as it was previously defined. Under the prior law, arson consisted of four degrees and was defined primarily as the wilful and malicious burning of the property of another, although the offense contained general provisions concerning the burning of one's own property to defraud an insurer and fourth degree arson included provisions against damaging property by explosives.<sup>105</sup> The penalties ranged from a term of imprisonment for five to twenty years to a term of one to five years, depending on the degree of the offense.

Under the new code, arson has been almost completely redefined to be the knowing or intentional damaging of property by fire or explosive.<sup>106</sup> The property may be the dwelling of another person which is damaged without his consent, the property of any person if human life is endangered, or the property of another person if the loss is at least twenty thousand dollars. "Property" is defined to mean anything of value and is not limited to real estate.<sup>107</sup> The penalty for this offense is a fixed term of two to eight years, except that it is raised to a term of six to twenty years if bodily injury actually results. Additional penalties are imposed if the offense is committed by a person for hire. Finally, arson is defined to include the offense of detonating an explosive with intent to injure a person as well as to damage property, although the penalties for the two offenses are the same.

The new offense of mischief is a lesser offense to cover other instances of damage to the property of another person, whether by trespass or other injury.<sup>108</sup> Again, with reference to this offense, property is defined to include anything of value. As redefined, these offenses do simplify and replace a number of separate statutes,<sup>109</sup> but the legislature should reconsider the penalties that have been prescribed for the various types of arson.

## 2. *Burglary and Trespass*

Burglary has also been drastically revised in the new code and is simply the entering of the building of another with an intent to commit a felony. The penalty is imprisonment for two to four years, but the penalty is raised to two to eight years if a deadly weapon is used or to six to twenty years if bodily injury is inflicted.<sup>110</sup> As redefined, the offense omits the traditional re-

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<sup>105</sup>IND. CODE §§ 35-16-1-1 to -8 (Burns 1975) (repealed effective July 1, 1977).

<sup>106</sup>*Id.* § 35-43-1-1 (Burns Supp. 1976)

<sup>107</sup>*Id.* § 35-41-1-2.

<sup>108</sup>*Id.* § 35-43-1-2.

<sup>109</sup>*See* PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 93-94.

<sup>110</sup>IND. CODE § 35-43-2-1 (Burns Supp. 1976).

quirement of a breaking along with the entering, eliminates Indiana's special provision which makes a person guilty of burglary if he enters a dwelling with intent to inflict even a minor injury upon a person therein, makes no distinction between a dwelling and other buildings, and substantially lowers some of the penalties for the offense.<sup>111</sup> The legislature should give serious consideration to restoring the distinction concerning dwellings and to increasing some of the penalties prescribed for this offense.

Trespass is defined to include a number of offenses relating to property, including both real estate and other property.<sup>112</sup> Burglary, as newly defined, is limited to buildings and similar structures and therefore entries into vehicles are now included only within the offense of trespass.

### 3. Robbery

Although robbery is defined somewhat differently in the new code, the offense does not appear to be substantially changed. As redefined, it is the knowing or intentional taking of property from the presence of another person by force or threats of force.<sup>113</sup> The words "knowingly or intentionally" have been added, but the requisite intent probably can be inferred from the use of force or the threat of force. The word "property" is used instead of "article of value," but "property" is defined to mean "anything of value." Although it might have been better for the new definition to state "from the person or presence of another," the use of the term "from the presence of another person" probably includes from the "person of another" and is an improvement over the former statute which merely stated "from the person of another."<sup>114</sup> Finally, the use of the term "force or by threatening the use of force" in place of the term "by violence or by putting in fear" eliminates the question concerning the amount of proof necessary to show that the victim was actually put in fear during the robbery.

Once again, however, the legislature should reconsider the penalties prescribed for this serious offense. The basic penalty has been reduced from a period of imprisonment for a term of ten to twenty-five years to a period of only two to four years. Additional penalties are prescribed in the new code, based on the existence

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<sup>111</sup>See *id.* § 35-13-4-4 (Burns 1975) (repealed effective July 1, 1977).

<sup>112</sup>*Id.* § 35-43-2-2 (Burns Supp. 1976).

<sup>113</sup>*Id.* § 35-43-3-1.

<sup>114</sup>*Id.* § 35-13-4-6 (Burns 1975) (repealed effective July 1, 1977). See also *id.* § 35-13-5-1.

of aggravating circumstances, but the highest penalty allowed is still only a period of six to twenty years as compared with a possible term of life imprisonment under the prior law. As a final note, robbery is included in the group of offenses related to property, but the gist of this offense is directed more towards the victim than to the property taken and therefore this offense should more properly be grouped with the offenses against the person.

#### 4. *Theft and Conversion*

In 1963, the Indiana General Assembly enacted a new statute entitled the "Offenses Against Property Act"<sup>115</sup> which was intended to consolidate a number of offenses related to theft and to "eliminate pointless procedural obstacles to the conviction of thieves and swindlers."<sup>116</sup> Although the new statute did help to simplify some of the difficulties in this area, the statute itself posed new difficulties, especially the provision defining theft, which was somewhat cumbersome and difficult to follow. Thus the Study Commission decided to redraft the provision in an attempt to simplify the offense of theft even further.<sup>117</sup> In its version, a person commits theft "when he knowingly exerts unauthorized control over property of the owner with the intent to deprive the owner of the property."<sup>118</sup> The commission then included a series of permissible inferences and definitions related to the offense. In addition, the commission recommended the creation of a new offense to be called "criminal conversion" which would be a lesser offense of theft.<sup>119</sup>

These recommendations were substantially altered by the legislature which reverted to the former cumbersome style for defining the offenses. In the enacted version, the provision defining the offense of theft again includes a number of parts that the commission had moved to the definitions section.<sup>120</sup> The legislature did enact the new offense of conversion but also used the same style that was used for the theft offense.<sup>121</sup> Furthermore, the commission's section concerning permissible inferences was revised and replaced by a section providing that certain specified types of evidence would be considered *prima facie* evidence of various facts.

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<sup>115</sup>*Id.* §§ 35-17-5-1 to -14.

<sup>116</sup>*Id.* § 39-17-5-2.

<sup>117</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 96-100.

<sup>118</sup>*Id.* at 96.

<sup>119</sup>*Id.* at 97.

<sup>120</sup>IND. CODE § 35-43-4-2 (Burns Supp. 1976).

<sup>121</sup>*Id.* § 35-43-4-3.

In view of the difficulty involved in defining these offenses, further amendments will undoubtedly be submitted to the General Assembly which may modify these offenses even further before the code becomes effective. Despite the benefits to be derived from simplification and consolidation, the difficulties encountered in defining theft may suggest the need to redivide theft into a number of distinct offenses that may be defined more easily. At the same time, the new offense of conversion should be reconsidered because it does not appear to be any different from the offense of theft despite the use of the words "under circumstances not amounting to theft" in the definition of conversion. If conversion is the same as theft but is included in the code as a misdemeanor to permit the filing of petty thefts in a court of limited jurisdiction, this should be acknowledged and done directly instead of purporting to create a different offense which in fact is not different.

### 5. *Forgery*

Indiana's previous forgery statute is one of the best examples of a statute that needed to be rewritten and simplified. For whatever reason, the statute included an exhaustive list of items subject to forgery and this tended to make the elements of the offense somewhat obscure.<sup>122</sup> The new code simplifies the offense by eliminating the list of items and emphasizes the nature or manner in which a writing is made or altered.<sup>123</sup> The offense is simplified to such an extent, however, that it would probably take a somewhat extended study to determine if the scope of the offense has been narrowed. Despite the extensive revision of this statute, one appropriate change was unfortunately left for later action by the legislature. The offense of forgery, as previously defined and as defined under the new code, in fact consists of two distinct and independent offenses, making and uttering a forged instrument.<sup>124</sup> For purposes of clarity, the forgery statute should be divided into two parts defining each of these offenses separately.

#### D. *Other Offenses*

##### 1. *Bribery and Official Misconduct*

A witness who solicits or accepts a bribe with reference to his appearance or testimony in an official proceeding is now subject to prosecution for bribery as well as the person who offers or

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<sup>122</sup>*Id.* § 35-1-124-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>123</sup>*Id.* § 35-43-5-2 (Burns Supp. 1976).

<sup>124</sup>*See* Sanford v. State, 255 Ind. 542, 265 N.E.2d 701 (1971).

gives the bribe.<sup>125</sup> Official misconduct is defined to cover knowing or intentional actions of a public servant that are unlawful, such as soliciting a "kickback" from an employee,<sup>126</sup> but the provision does not specifically include what previously was known as the "ghost employees" offense.<sup>127</sup> Even if included under official misconduct, the new offense is only a misdemeanor whereas the former offense was a felony. Although the offense probably could be prosecuted as theft under the provision relating to control of property "in a manner or to an extent other than that to which the other person has consented,"<sup>128</sup> the former statute should be reenacted because it is much more specific and includes a civil remedy for the recovery of unearned salary payments.

## 2. *Perjury*

Perjury is defined as the making of a "false, material statement under oath or affirmation, before a person authorized by law to administer oaths, knowing the statement to be false or not believing it to be true."<sup>129</sup> As drafted, the provision combines two prior statutes that dealt with false statements made under a required oath or affirmation<sup>130</sup> and false statements voluntarily made under oath or affirmation.<sup>131</sup> In combining the two offenses, the legislature eliminated the provision that the oath be a requirement under the law. Furthermore, the new provision eliminated two other distinctions between the offenses by requiring that the statements be both false and material to the matter in question. Unfortunately, the penalty was reduced from a term of imprisonment for a period of one to ten years to a term of two to four years. This penalty should be reconsidered because the offense of perjury goes to the very basis of the judicial system.

## 3. *Assisting a Criminal*

The new offense of assisting a criminal<sup>132</sup> also combines certain prior offenses, including harboring, concealing, or assisting an offender who has committed an offense and compounding felonies, misdemeanors, or prosecutions.<sup>133</sup> As revised, the harbor-

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<sup>125</sup>IND. CODE § 35-44-1-1(a) (7) (Burns Supp. 1976).

<sup>126</sup>*Id.* § 35-44-1-2.

<sup>127</sup>*Id.* §§ 35-22-8-1 to -5 (Burns 1975) (repealed effective July 1, 1977).

<sup>128</sup>*Id.* § 35-43-4-2 (Burns Supp. 1976).

<sup>129</sup>*Id.* § 35-44-2-1.

<sup>130</sup>*Id.* § 35-1-90-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>131</sup>*Id.* § 35-1-90-2.

<sup>132</sup>*Id.* § 35-44-3-2 (Burns Supp. 1976).

<sup>133</sup>*See id.* §§ 35-1-29-3, 35-1-91-1 to -3, and 35-1-92-1 (Burns 1975) (repealed effective July 1, 1977).

ing, concealing, and assisting offenses are extended to include misdemeanors and the compounding offenses are changed to include the exceptions for family relationships as well as being extended to cover both felonies and misdemeanors. The new provision may, however, raise a serious question of interpretation concerning all of the offenses because it omits any element concerning the offender's knowledge. The offender must have an intent to hinder the apprehension or punishment of the person assisted, but there is no requirement that the offender actually know that the other person has committed a particular crime or even any crime. The element of knowledge was likewise not included in the prior accessory after the fact statute, but the other statutes involved did provide that an offender was to have knowledge of the commission of a crime although not necessarily the particular crime actually committed.

#### 4. *Disorderly Conduct*

As redefined, disorderly conduct has been expanded substantially by the elimination of the requirement that a neighborhood or family be disturbed.<sup>134</sup> Four types of conduct are specified, and the first two are almost certain to invite litigation. The first includes the language "tumultuous and violent conduct" and the second refers to "unreasonable noise." Since no guidelines are included with reference to these terms, they may be subject to the challenge that they are too vague.

#### 5. *Bigamy*

Bigamy has been redefined to make doubly certain that a person can remarry in good faith without later being concerned with a bigamy prosecution. The previous statute made no reference to good faith as a defense, but the defense was recognized by the Indiana appellate courts.<sup>135</sup> As revised by the legislature, the new statute provides that one element of bigamy is knowledge that the spouse is alive and that it is a defense that the accused person reasonably believed that he was eligible to remarry.<sup>136</sup>

#### 6. *Contributing to the Delinquency of a Minor*

Although the Study Commission's comment concerning con-

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<sup>134</sup>Compare *id.* § 35-45-1-3 (Burns Supp. 1976) with *id.* § 35-27-2-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>135</sup>*Id.* § 35-1-81-1 (Burns 1975) (repealed effective July 1, 1977); *Leseuer v. State*, 176 Ind. 448, 95 N.E. 239 (1911); *Squire v. State*, 46 Ind. 459 (1874).

<sup>136</sup>IND. CODE § 35-46-1-2 (Burns Supp. 1976).

tributing to the delinquency of a minor suggests that the revised version is based upon present law,<sup>137</sup> the new version appears to make a substantial change in the present law. The new code provides that the offense is committed when a person eighteen years of age or older "causes" a person under the age of eighteen years to commit an act of delinquency.<sup>138</sup> Under the prior act, it was sufficient if the offender "caused" or "encouraged" the minor to commit an act of delinquency.<sup>139</sup> This was interpreted to mean that the minor did not in fact have to commit the act for the offender to be guilty of the offense.<sup>140</sup> Acts of "encouragement" may be covered by the general attempt statute, but only in a limited way.

### 7. *Controlled Substances*

One complete article (article 48) of the code is devoted to controlled substances, and the article contains essentially a re-enactment of the existing law in this area.<sup>141</sup> It should be noted that the possession of a small amount of marijuana or hashish is a misdemeanor for the first offense under the code.<sup>142</sup>

### E. *Sentencing (Article 50)*

Two of the most basic changes in the new code are included in the last article, which contains the sentencing provisions. As provided in this article, sentences will now be imposed by judges instead of juries and sentences of imprisonment will be for a determinate instead of an indeterminate period of time. This article, which also includes a number of other changes, proved to be the most controversial part of the new code as evidenced by the substantial differences between the version proposed by the Study Commission and the article as it was finally enacted.

#### 1. *Sentencing Authority*

The new code makes a substantial improvement in the existing law and eliminates a considerable amount of confusion by simply providing that the "court shall sentence a person convicted of an offense."<sup>143</sup> Under the prior law, juries and judges were both involved in the sentencing process and it was somewhat dif-

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<sup>137</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 139.

<sup>138</sup>IND. CODE § 35-46-1-8 (Burns Supp. 1976).

<sup>139</sup>*Id.* § 35-14-1-1 (Burns 1975) (repealed effective July 1, 1977). See also *id.* § 31-5-4-2.1.

<sup>140</sup>Montgomery v. State, 115 Ind. App. 189, 57 N.E.2d 943 (1944).

<sup>141</sup>Compare IND. CODE § 35-48-1-1 (Burns Supp. 1976) with *id.* § 35-24-1-4.1-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>142</sup>*Id.* § 35-48-4-11 (Burns Supp. 1976).

<sup>143</sup>*Id.* § 35-50-1-1.

ficult to ascertain the respective role of each. As a general rule, juries decided the sentences for misdemeanors and for murder and treason and judges imposed sentences with reference to other offenses.<sup>144</sup> Despite this general rule, however, juries were also authorized to determine an appropriate fine in all cases and the judge's role was generally limited to imposing the legislatively prescribed indeterminate sentence of imprisonment or granting probation in appropriate cases.<sup>145</sup> Furthermore, juries were authorized to decide the appropriate sentence of imprisonment for the commission of a crime while armed with a deadly weapon<sup>146</sup> whereas judges were authorized to decide the appropriate term of imprisonment for a bank robbery and were not limited by a legislatively determined period of time.<sup>147</sup>

## 2. *Determinate Sentencing*

Both the Study Commission and the General Assembly agreed that Indiana's indeterminate sentencing procedures should be eliminated,<sup>148</sup> but the General Assembly virtually rejected the commission's recommendation concerning the sentencing procedures to be adopted. The commission recommended that a term of life imprisonment be imposed for Class A felonies and that the judge be authorized to impose a fixed or determinate sentence of imprisonment in other cases within certain ranges, depending on the classification of the offense. For example, the judge could impose a fixed term of from one to thirty years for a Class B felony, from one to twenty years for a Class C felony, and from one to ten years for a Class D felony.<sup>149</sup> This recommendation, unfortunately, was open to the objection that it gave the judge too much uncontrolled discretion and that the penalties for various offenses could in effect be raised or lowered substantially, depending on the individual judge's point of view. Furthermore, the provision would

<sup>144</sup>See *id.* §§ 35-8-2-1 to -3 (Burns 1975) (repealed effective July 1, 1977).

<sup>145</sup>See *Hollars v. State*, 259 Ind. 229, 286 N.E.2d 166 (1972).

<sup>146</sup>IND. CODE § 35-12-1-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>147</sup>*Id.* § 35-13-5-1.

<sup>148</sup>See *id.* §§ 35-8-2-1 to -3. Although the prior law generally provided for indeterminate sentences, various statutes did authorize determinate sentences for specific offenses, including the following: interfering with public officials (*id.* § 35-1-77-1); riots (*id.* §§ 35-1-77-9 to -11); commission of felony while armed (*id.* § 35-12-1-1); involuntary manslaughter by motor vehicle (*id.* 35-13-4-2); bank robbery (*id.* § 35-13-5-1); escape (*id.* §§ 35-21-2-1, 35-21-5-1, 35-21-6-1, 35-21-7-1, 35-21-8-1); trafficking with an inmate (*id.* § 35-21-12-3); and handgun violations (*id.* §§ 35-23-4.1-18(b) and (c)) (all repealed effective July 1, 1977).

<sup>149</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 184.



tend to permit or even encourage nonuniformity in sentences despite the apparent effort of the commission to promote uniformity through the classification system. As a result, the General Assembly adopted a different procedure for the imposition of sentences although agreeing to make such sentences determinate. Under the code as enacted, life sentences were eliminated and judges were authorized to impose fixed terms for all offenses within certain ranges, but the judge's discretion with regard to these ranges was severely restricted. For example, the judge is authorized to impose a two year term for a Class D felony but may add up to an additional two years because of aggravating circumstances.<sup>150</sup> A term of five years is prescribed for a Class C felony, but the judge may add up to three years because of aggravating circumstances or may subtract up to three years because of mitigating circumstances.<sup>151</sup> Likewise, a term of ten years is prescribed for a Class B felony with provisions for an additional ten years or the subtraction of four years, depending on the circumstances.<sup>152</sup> Unfortunately, the penalty for Class A felonies does not follow this pattern and should be amended in the interest of uniformity and clarity. The code merely provides for a penalty of from twenty to fifty years for Class A felonies.<sup>153</sup> The General Assembly was not satisfied with only these restrictions, however, and therefore added a section to the procedural law by which judges are also required to make a record of their reasons for imposing a particular sentence.<sup>154</sup> Such a requirement would appear to be appropriate when the judge deviates from the legislatively prescribed sentence, either by increasing or by decreasing the term of imprisonment, but the provision appears to be inappropriate if the judge adopts what the legislature has prescribed. The requirement would probably be satisfied, however, if the judge simply states that he is imposing the prescribed sentence because of the absence of any aggravating or mitigating circumstances.

### 3. *Definition of Offenses*

Indiana's prior criminal code began with the clear and direct statement that all crimes and offenses are to be divided into two categories, felonies and misdemeanors. A felony is defined as a crime or offense which may be punished by death or imprison-

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<sup>150</sup>IND. CODE § 35-50-2-7 (Burns Supp. 1976).

<sup>151</sup>*Id.* § 35-50-2-6.

<sup>152</sup>*Id.* § 35-50-2-5.

<sup>153</sup>*Id.* § 35-50-2-4.

<sup>154</sup>Pub. L. No. 148, § 14, 1976 Ind. Acts 718 has been compiled in Burns' Indiana Code as § 35-8-1A-3 (Burns Supp. 1976), but designated as § 35-4.1-4-3 in the official Indiana Code.

ment in the state prison and a misdemeanor is defined as any other offense.<sup>155</sup> The Study Commission also included a basic definitional section near the beginning of its proposed code, but the commission recommended a distinct change from the existing law. As recommended, the term "offense" was the basis for the reclassification and was defined as including "crimes" and "infractions," a new category of offenses. Crimes were divided into felonies and misdemeanors, depending on the length of imprisonment instead of the place of confinement. Infractions were not subdivided further but were defined to include offenses as defined by city ordinances, any offense specifically designated as an infraction by the legislature, or any offense for which the legislature did not prescribe a term of imprisonment.<sup>156</sup> This recommendation was apparently accepted by the General Assembly, but unfortunately the commission's definitional section was omitted from the code. Thus the new code does not contain any definitional section equivalent to the provision that was placed at the beginning of the former code. The new code clearly reflects the new classifications, however, such as in the sentencing article which contains provisions concerning felonies, misdemeanors, and infractions, but it includes only a short definition of "offenses" which is found in the middle of the lengthy definitions section at the beginning of the code and a definition of "felonies" which is included in the sentencing article. In the former, an "offense" is defined simply to mean "a felony, a misdemeanor, or an infraction."<sup>157</sup> The sentencing article defines only a "felony conviction" and provides that this includes "a conviction, in any jurisdiction, with respect to which the person could have been imprisoned for more than one (1) year."<sup>158</sup> Since misdemeanors and infractions are not expressly defined in the code, their definitions must be drawn from a review of the penalties authorized for such offenses. As would be expected, a misdemeanor is thus defined as an offense punishable by imprisonment for not more than one year.<sup>159</sup> Likewise, an infraction is an offense punishable only by a fine of not more than five hundred dollars.<sup>160</sup>

The new classifications concerning felonies and misdemeanors conform to the present classifications in the federal system,<sup>161</sup> but the new category of infractions has no similar counterpart under

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<sup>155</sup>IND. CODE § 35-1-1-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>156</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 8-9.

<sup>157</sup>IND. CODE § 35-41-1-2 (Burns Supp. 1976).

<sup>158</sup>*Id.* § 35-50-2-1.

<sup>159</sup>*Id.* § 35-50-3-2.

<sup>160</sup>*Id.* § 35-50-4-2.

<sup>161</sup>*See* 18 U.S.C. § 1 (1970).

the federal law. Two infractions are included in the new Indiana code, provocation to commit a battery<sup>162</sup> and harboring a non-immunized dog,<sup>163</sup> but the term will undoubtedly be applied to many other offenses that are defined in provisions outside the new code. In fact, it might be more appropriate to remove the two infractions from the code and reserve the use of the term for offenses found outside the code. As a final note, the limit of a five hundred dollar fine for infractions should be reconsidered, and the legislature should increase the maximum amount and establish a range of infractions similar to that for felonies and misdemeanors.

#### 4. *Habitual Offenders*

Under Indiana's existing law, a person who has been convicted of three felonies may be subject to imprisonment for life as a habitual offender.<sup>164</sup> The Study Commission recommended that these provisions be retained but in a somewhat modified form. For example, the commission recommended that the life term be changed to a term of not more than thirty years.<sup>165</sup> Instead of following the commission's recommendations, however, the General Assembly decided to provide enhanced penalties for any person convicted of a third felony. The provisions concerning the penalties for each felony classification were thus revised to include such enhanced penalties,<sup>166</sup> and the provisions concerning habitual offenders were omitted from the code. This change might not have any substantial impact on the ultimate time that a person would be required to serve in prison since the code still authorizes a lengthy period of imprisonment in such cases, but the new approach does raise serious procedural questions. Because of the danger of prejudice to a defendant, Indiana has developed specialized procedures for habitual offender prosecutions, including a two-stage trial.<sup>167</sup> Such procedures may likewise be required with reference to enhanced penalties based on prior convictions,<sup>168</sup> and the legislature should clarify the question by reconsidering the commission's recommendations concerning habitual offenders or by adding appropriate provisions to the penalty sections.

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<sup>162</sup>IND. CODE § 35-42-2-3 (Burns Supp. 1976).

<sup>163</sup>*Id.* § 35-46-3-1.

<sup>164</sup>*Id.* §§ 35-8-8-1 and 2 (Burns 1975) (repealed effective July 1, 1977).

<sup>165</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 185-87.

<sup>166</sup>IND. CODE §§ 35-50-2-4 to -7 (Burns Supp. 1976).

<sup>167</sup>*Lawrence v. State*, 259 Ind. 306, 286 N.E.2d 830 (1972).

<sup>168</sup>*See United States v. Tucker*, 404 U.S. 443 (1972); *Lewis v. State*, 337 N.E.2d 516 (Ind. Ct. App. 1975).

### 5. Concurrent Sentencing

Indiana has generally followed a system of imposing concurrent sentences when a person has been convicted of two or more offenses, subject to certain specified exceptions.<sup>169</sup> The new code continues this system but modifies the existing law by providing that consecutive terms may be imposed for a failure to appear and for any crime committed during an escape. The code also omits the prior provision for consecutive sentences for the commission of a felony while armed.<sup>170</sup> In addition, the code purports to authorize consecutive sentences for any crime committed while a person is in prison, but the code will need to be amended before becoming effective because it appears inadvertently to have omitted the time at which a term of imprisonment for such an offense is to begin.

### 6. Probation

Under the code, a judge is authorized to suspend any part of a sentence for a misdemeanor and to place the defendant on probation for a fixed period of not more than one year.<sup>171</sup> Likewise, subject to certain exceptions, the judge may suspend any part of a felony sentence and place the defendant on probation for a fixed period to end not later than the expiration of the suspended sentence.<sup>172</sup> These provisions represent a change in the prior law which limited the period of probation to the maximum period for which the defendant could have been sentenced or to a period of five years, whichever was the lesser.<sup>173</sup> Furthermore, the provision concerning felonies leaves no discretion to the judge but requires the judge to place a defendant on probation if the sentence is suspended. On the other hand, the judge is given the discretion to suspend a sentence for a misdemeanor without placing the defendant on probation.<sup>174</sup>

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<sup>169</sup>A judge may not impose a consecutive sentence unless a specific statute authorizes such a sentence. *Baromich v. State*, 252 Ind. 412, 249 N.E.2d 30 (1969). See IND. CODE § 11-2-1-1 (Burns 1973). Consecutive sentences are authorized with reference to commission of a felony while armed [*id.* § 35-12-1-1 (Burns 1975) (repealed effective July 1, 1977)], handgun violations [*id.* § 35-23-4.1-18(d) (Burns 1975)], jail breaking [*id.* § 35-21-8-1 (Burns 1975) (repealed effective July 1, 1977)], escape from prison [*id.* §§ 35-1-96-9 and 35-21-6-1], commission of a crime while released on bail [*id.* § 35-8-7.5-1 (Burns Supp. 1976) (repealed effective July 1, 1977)], and commission of a crime while on parole [*id.* § 11-1-1-11 (Burns 1973)].

<sup>170</sup>See *id.* § 35-50-1-2 (Burns Supp. 1976) and note 169 *supra*.

<sup>171</sup>IND. CODE § 35-50-3-1 (Burns Supp. 1976).

<sup>172</sup>*Id.* § 35-50-2-2.

<sup>173</sup>IND. CODE § 35-7-2-2 (Burns 1975) (repealed effective July 1, 1977).

<sup>174</sup>A form of probation is also authorized with reference to infractions,

With reference to sentences for felonies that may not be suspended, the new code reflects a number of changes from the existing law. The present law authorizes a judge to suspend the sentence for any felony except murder, arson, first degree burglary, rape, treason, kidnapping, a second conviction of robbery, and the commission of a felony while armed with a deadly weapon.<sup>175</sup> The Study Commission recommended that probation be authorized except for Class A felonies, habitual offender convictions, and commission of a felony while armed with a deadly weapon.<sup>176</sup> This recommendation was not accepted by the legislature which apparently preferred to enact a specific list of particular sentences which could not be suspended. In its list, the legislature included murder, kidnapping, arson for hire, and other specified offenses involving either serious bodily injury or the use of a deadly weapon.<sup>177</sup> This list thus enacted includes more offenses than under the prior law, but the offenses as included under the prior list have been substantially limited by the provisions concerning serious bodily harm and use of a deadly weapon. For example, arson and first degree burglary were on the prior list, but the new code includes only arson for hire or arson resulting in serious bodily injury and burglary with a deadly weapon or burglary resulting in serious bodily injury.

#### 7. Parole

The last major change reflected in the new code is with reference to parole. Accepting the recommendation of the Study Commission,<sup>178</sup> the legislature provided that a person who is imprisoned for a felony is to be released on parole upon completing his sentence of imprisonment, less good time that has been earned.<sup>179</sup> Since this release is to be automatic, the Indiana Parole Board is to be involved in the supervision of defendants only after they have been released on parole. The Parole Board's authority is substantially limited, however, because the legislature also pro-

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the judge being given authority to suspend the fine and costs for an infraction if the defendant does not repeat the offense for a fixed period of not more than one year from the date of sentencing. IND. CODE § 35-50-4-1 (Burns Supp. 1976). Provision for "shock" probation and intermittent service of sentences were also enacted by the legislature along with the criminal code. See Pub. L. No. 148, § 16, 1976 Ind. Acts 718, 808, compiled as § 35-8-1A-18 (Burns Supp. 1976), but designated as § 35-4.1-4-18 in the official Indiana Code, and § 35-7-2-1(c).

<sup>175</sup>*Id.* §§ 35-7-1-1 (Burns 1975) (amended effective July 1, 1977), 35-12-1-1, 35-13-4-3 (Burns 1975) (repealed effective July 1, 1977).

<sup>176</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 192.

<sup>177</sup>IND. CODE § 35-50-2-2 (Burns Supp. 1976).

<sup>178</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 188.

<sup>179</sup>IND. CODE § 35-50-6-1 (Burns Supp. 1976).

vided that a parolee is to be discharged not more than one year after the date of his release on parole unless his parole has been revoked within that one year period of time. In this regard, the legislature decided not to follow the recommendation of the Study Commission which had proposed a period of parole until the expiration of the person's specified sentence or for a period of five years, whichever was the lesser.

#### *F. Conclusion*

Five possible arguments can be made in support of the revision and codification of Indiana's criminal laws, and these are essentially of two types, those which are concerned with matters of form and those which are concerned with matters of substance. For example, it can be argued that there has been a need to organize all of the laws relating to criminal conduct into one volume or one set of volumes in order to simplify research and bookwork for those involved in the field of criminal law or those interested in finding certain information relating to criminal law. Furthermore, since the state's criminal laws have been developed over a lengthy period of time, there has also been a need to review the laws in order to eliminate those statutes which were duplications, those which have been repealed or declared unconstitutional, and those which have become obsolete because of the passage of time. These arguments are concerned primarily with matters of form and certainly involve worthwhile objectives. On the other hand, it can be argued that certain basic changes have been needed in the Indiana criminal justice system and that these changes could be made only by a complete revision and codification of the state's criminal laws. Furthermore, there has been a need to clarify laws that were confusing or laws that appeared to be inconsistent, especially when the laws were enacted at different periods of time without any apparent effort to ensure that the provisions were consistent or would fit together into a coordinated system. Finally, it can be argued that the state's criminal laws have contained certain gaps or voids because of the uncoordinated manner in which the laws have been enacted and that the revision and codification process was necessary in order to identify the gaps or voids to be filled by the legislature.

Despite the importance of each of these arguments, there are substantial arguments that can be made against the new code. First, it can be argued that the new code still contains a number of problems and unanswered questions, as shown by this review, and the very scope of the undertaking almost ensures that there are other undetermined difficulties and issues in the code that

continue to exist because of the lack of time to study and review each item in the necessary detail. Secondly, it can be argued that the enactment of the new code will create an uncertainty concerning all of the criminal laws when it finally becomes effective. Furthermore, the uncertainty will cause confusion in the courts and will tend to encourage an increasing number of appeals in criminal cases or at least increase the number of issues being raised in criminal appeals. Finally, the revision and enactment of a controversial code of this nature must have required a certain amount of compromise, and therefore it is probable that no one is completely satisfied with the end product. Thus it can be argued that each statute should have been reviewed and submitted to the legislature individually to ensure proper consideration and review by all persons concerned and to avoid the necessity for such compromises.

The arguments opposing revision and codification are substantial and somewhat difficult to refute, and therefore the ultimate verdict on the new code must be based on the relative merits of the code and the manner in which it meets or satisfies the objective of its proponents. The new code is clearly a step in the right direction to the extent that it reorganizes the state's criminal laws and places them together in one volume, but the code is far from complete and many criminal laws still remain outside the code in an unorganized fashion. For example, the Study Commission included recommended provisions concerning abortion<sup>160</sup> and firearms<sup>161</sup> in its proposed code, but the legislature omitted these provisions from the new code and allowed these subjects to be covered as they had been by the existing statutes.<sup>162</sup> Furthermore, the Study Commission also decided to omit certain subjects from its review, such as obscenity, traffic offenses, administrative crimes, and juvenile matters. Obscenity is a subject that should properly be included in the criminal code but undoubtedly was omitted because the legislature had enacted a statute in 1975 on this subject.<sup>163</sup> The other three topics are generally not included in a criminal code, but they are mentioned here because it is important to realize that criminal laws are found in many other places besides the criminal code. For example, an offense of reckless homicide by use of a motor vehicle is found in

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<sup>160</sup>PENAL CODE: PROPOSED FINAL DRAFT, *supra* note 5, at 116-20.

<sup>161</sup>*Id.* at 143-151.

<sup>162</sup>See IND. CODE §§ 35-1-58.5-1, 35-23-4.1-1 (Burns 1975).

<sup>163</sup>*Id.* §§ 35-30-10.1-1, 35-30-10.5-1, 35-30-11.1-1.



the Motor Vehicle Code<sup>184</sup> and the common offense of public intoxication is included in the Alcoholic Beverages Code.<sup>185</sup>

As suggested by the code's proponents, many unnecessary statutes have been repealed and eliminated. For example, a number of apparently obsolete statutes have been repealed, including offenses such as profanity,<sup>186</sup> obstructing a ferryboat,<sup>187</sup> fortune telling,<sup>188</sup> trespass by turkeys, chickens, ducks and geese,<sup>189</sup> and dueling.<sup>190</sup> At the same time, others have been repealed, apparently for the same reason, but there may be some dispute as to whether they are or are not obsolete. For example, the statutes relating to seduction,<sup>191</sup> adultery and fornication,<sup>192</sup> and sodomy between consenting adults<sup>193</sup> have been eliminated. Other statutes have been properly eliminated, probably because they are unconstitutional, including the statutes concerning paupers, vagrants, and tramps.<sup>194</sup> Finally, statutes defining offenses such as mayhem,<sup>195</sup> murder by dueling,<sup>196</sup> and lynching<sup>197</sup> have been repealed because they appeared to be duplications or involved offenses that appeared to be included in other statutes.

The reorganization of the state's criminal laws and the elimination of unnecessary statutes are worthwhile objectives, but these improvements may not necessarily have any substantial impact on the administration of justice in the state. On the other hand, the new code does contain a number of basic changes that should make a substantial impact on the state's criminal justice system. In fact, the primary value of the revision and classification process is reflected in these basic changes which include the organization of offenses into certain basic categories, the classification of offenses according to the seriousness of each offense, the elimination of indeterminate sentences, and the elimination of juries from the sentencing process. In addition, the new code does include a number of worthwhile clarifications such as the provisions concerning culpability and the elimination of the distinction between

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<sup>184</sup>*Id.* 9-4-1-54 (Burns Supp. 1976).

<sup>185</sup>*Id.* § 7.1-5-1-3.

<sup>186</sup>*Id.* § 35-1-85-1 (Burns 1975) (repealed effective July 1, 1977).

<sup>187</sup>*Id.* § 35-27-5-1.

<sup>188</sup>*Id.* § 35-18-7-1.

<sup>189</sup>*Id.* § 35-19-1-1.

<sup>190</sup>*Id.* § 35-1-53-1.

<sup>191</sup>*Id.* § 35-1-82-3.

<sup>192</sup>*Id.* § 35-1-82-2.

<sup>193</sup>*Id.* § 35-1-89-1.

<sup>194</sup>*Id.* §§ 35-1-110-1 to -3.

<sup>195</sup>*Id.* §§ 35-1-54-5 and -6.

<sup>196</sup>*Id.* §§ 35-1-53-1 and -2.

<sup>197</sup>*Id.* § 35-1-77-3.



first and second degree murder. Likewise, the new code does include new provisions such as the general attempt statute and the unlawful confinement statute which were enacted to fill certain apparent gaps or voids in the existing law.

When all of these changes and improvements are considered together, they appear to be sufficient to outweigh the various arguments that can be made against the new code. The code does contain a number of difficulties, as discussed above, but many of these can be remedied and the General Assembly has specifically deferred the effective date of the new code to provide for appropriate amendments. When these have been enacted and the code is finally effective, the General Assembly should then consider establishing an agency such as the Indiana Criminal Law Study Commission to continue the process of review and revision of the state's criminal laws. In this way, the state can keep its criminal code up to date and avoid the need to recodify the code again during the celebration of the nation's tricentennial.

## II. Administrative Law

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### A. Scope of Judicial Review

One of the more interesting cases in the area of administrative law during the survey period was *City of Evansville v. Southern Indiana Gas & Electric Co.*,<sup>1</sup> which may indicate a new trend in the judicial review of administrative agency decisions in Indiana. Prior to *City of Evansville*, Indiana courts had adopted as the appropriate test of an agency's factual determination, whether there was substantial evidence in the administrative record to support the agency's finding.<sup>2</sup> However, many of the decisions which had explicitly discussed the method of determining substantiality had stated that the only evidence to be considered was that most

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The author wishes to thank Kathryn Wunsch for her assistance in preparing this discussion.

<sup>1</sup>339 N.E.2d 562 (Ind. Ct. App. 1975).

<sup>2</sup>See, e.g., *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. 525, 159 N.E.2d 121 (1959); *Knox Co. Rural Elect. Membership Corp. v. Public Serv. Co.*, 139 Ind. App. 547, 213 N.E.2d 714 (1966); *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. 216, 218 N.E.2d 171 (1966); *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. 232, 180 N.E.2d 110 (1962).

supportive of the agency's findings.<sup>3</sup> The language of these opinions indicated that the Indiana courts were at odds with the federal courts which, pursuant to *Universal Camera Corp. v. NLRB*,<sup>4</sup> reviewed the record as a whole for substantial evidence, considering evidence opposing as well as supporting the agency's findings of fact.

In *City of Evansville*, the Second District Court of Appeals, deciding an appeal from a Public Service Commission order granting a rate increase to the petitioner electric company, carefully reviewed Indiana decisions<sup>5</sup> construing the statutory standard of judicial review of Public Service Commission factual determinations.<sup>6</sup> On the strength of these decisions, the court of appeals concluded that in reviewing Public Service Commission findings Indiana courts have indeed looked to the entire record, rather than merely to evidence supporting the agency findings.<sup>7</sup> Recognizing

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<sup>3</sup>See, e.g., *Ind. Educ. Emp. Relations Bd. v. Board of School Trustees*, 355 N.E.2d 269 (Ind. Ct. App. 1976); *Leonard v. Kraft Foods Co.*, 122 Ind. App. 131, 102 N.E.2d 512 (1951); *Kemble v. Aluminum Co. of America*, 120 Ind. App. 72, 90 N.E.2d 134 (1950). Cf. *Kelly v. Walker*, 316 N.E.2d 695 (Ind. Ct. App. 1974); *Kinzel v. Rettinger*, 151 Ind. App. 119, 277 N.E.2d 913 (1972). Many of the pre-*Kinzel* decisions holding that a reviewing court should consider only evidence most favorable to the agency's decision were workmen's compensation cases. Fuchs, *Judicial Control of Administrative Agencies In Indiana*: II, 28 IND. L.J. 293, 328 (1953). See IND. CODE § 22-3-4-8 (Burns 1974), which governs the review of workmen's compensation cases and provides that the Industrial Board's findings of fact are binding on the reviewing court. But see *Warren v. Indiana Tel. Co.*, 217 Ind. 93, 26 N.E.2d 399 (1940), a workmen's compensation appeal in which the court stated "the order will be set aside . . . the proof, taken as a whole, does not support the conclusion reached." *Id.* at 119, 26 N.E.2d at 409 (emphasis supplied).

<sup>4</sup>340 U.S. 474 (1951).

<sup>5</sup>See cases cited note 2 *supra*.

<sup>6</sup>IND. CODE § 8-1-3-1 (Burns 1971).

<sup>7</sup>339 N.E.2d at 571-72, citing cases cited at note 2 *supra*. It must be noted that in each of these cases, the courts merely stated the general rule that the standard of judicial review of administrative agency decisions is substantial evidence, without discussing whether the reviewing court should examine the record as a whole. See *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. at 530, 159 N.E.2d at 124; *Knox Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 139 Ind. App. at 554, 213 N.E.2d at 718; *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. at 219, 218 N.E.2d at 173; *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. at 244, 180 N.E.2d at 116. However, in each case the court actually considered evidence in opposition to as well as in support of the commission's findings. See *Boone Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 239 Ind. at 531, 159 N.E.2d at 125-26; *Knox Co. Rural Elec. Membership Corp. v. Public Serv. Comm'n*, 139 Ind. App. at 549, 213 N.E.2d at 715; *Pennsylvania R.R. v. Town Bd. of Trustees*, 139 Ind. App. at 223, 218 N.E.2d at 176; *City of Terre Haute v. Terre Haute Water Works Corp.*, 133 Ind. App. at 237, 180 N.E.2d at 113.

that "[j]udicial attempts to define the meaning of substantial evidence have met with less than unqualified success,"<sup>8</sup> the court noted that the Indiana Supreme Court had adopted the pre-*Universal Camera* federal standard of substantial evidence in 1956.<sup>9</sup> Then, relying on *Universal Camera*, the court concluded "that the substantial evidence standard authorizes a reviewing court to set aside Commission findings of fact when a review of the whole record clearly indicates that the agency's decision lacks a reasonably sound basis of evidentiary support."<sup>10</sup>

In assessing the potential impact of *City of Evansville* on Indiana law, several considerations are relevant. First, the court of appeals did not limit the *City of Evansville* scope of review to Public Service Commission decisions, since the opinion clearly states that under Indiana law the substantial evidence test is generally applicable to judicial review of administrative agencies.<sup>11</sup> Therefore, *City of Evansville* may affect the entire field of administrative law in the state. Secondly, the court of appeals did not address the issue of whether its holding alters the standard of review ostensibly followed by Indiana courts in the past.<sup>12</sup> The tenor of the opinion suggests that this was not an oversight,<sup>13</sup> but an at-

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<sup>8</sup>339 N.E.2d at 572. The court cites Professor Davis as possibly providing the "best analysis":

The meaning of 'substantial evidence' is about as clear and about as vague as it should be; the main inquiry is whether on the record the agency could reasonably make the finding. . . . Despite the theory, the judges as a matter of practical fact have a good deal of elbow room to vary the intensity of review as they deem necessary or desirable in particular cases.

4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 29.01, at 118 (1958).

<sup>9</sup>339 N.E.2d at 572, quoting from *Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 80-81, 131 N.E.2d 308, 312 (1956). In *City of Indianapolis* the Indiana Supreme Court relied on *Florida v. United States*, 292 U.S. 1 (1934), for the proposition that an agency's "findings of fact supported by substantial evidence are not subject to review." *Id.* at 12, quoted in 235 Ind. at 80-81, 131 N.E.2d at 312. Neither the United States Supreme Court in *Florida v. United States* nor the Indiana Supreme Court in *City of Indianapolis* discussed whether the reviewing court should look at the record as a whole in determining the substantiality of evidence.

<sup>10</sup>339 N.E.2d at 572. In a case decided after the survey period, the court of appeals reprinted in its opinion the entire section of *City of Evansville* dealing with the scope of review. See *L. S. Ayres & Co. v. Indianapolis Power & Light Co.*, 351 N.E.2d 814 (Ind. Ct. App. 1976).

<sup>11</sup>339 N.E.2d at 572.

<sup>12</sup>The court, quite to the contrary, stated that: "It is . . . well settled that in determining the "substantiality" of the evidence, the reviewing court must consider the evidence in opposition to the challenged finding of fact as well as the evidence which tends to support the finding." *Id.* at 573 (emphasis added).

<sup>13</sup>See *id.* at 572-73.

tempt to explicitly recognize what the court viewed as the form of judicial review practiced by many courts in the state for several years.<sup>14</sup> Finally, *City of Evansville* is the first reported Indiana decision expressly relying on *Universal Camera*. The scope of review adopted by the United States Supreme Court in *Universal Camera* was dictated by the Court's construction of the judicial review provisions in the federal Administrative Procedure Act<sup>15</sup> and the Taft Hartley Act,<sup>16</sup> both of which specifically direct the reviewing body to consider the record as a whole.<sup>17</sup> In contrast, neither the Indiana Administrative Adjudication Act<sup>18</sup> nor the provisions for judicial review in the Public Service Commission Act<sup>19</sup> specifically require review of the whole record.<sup>20</sup> The specific statutory basis for the *Universal Camera* decision is therefore absent from the Indiana statutes, although the language of both Acts is broad enough to allow a consideration of the whole record. It will be interesting to see whether *City of Evansville* will be followed, ignored, or limited to its facts.

### B. Findings of Fact

In reviewing the inferences drawn by an administrative agency from basic facts, the courts will attempt to determine whether the agency's inferences are reasonable. An agency's findings of fact must be sufficiently specific to permit an intelligent judicial review of the agency's decision.<sup>21</sup> Two cases from the Second District Court of Appeals during the survey period dealt with the specificity of an administrative board's findings

<sup>14</sup>See note 7 *supra*.

<sup>15</sup>U.S.C. § 706 (1970) provides, in pertinent part, "In making the . . . determination, the court shall review the whole record . . ." (Emphasis supplied).

<sup>16</sup>29 U.S.C. § 160(e) (1970) provides, in pertinent part, "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." (Emphasis supplied).

<sup>17</sup>See notes 16 and 17 *supra*.

<sup>18</sup>IND. CODE §§ 4-22-1-1 through -30 (Burns 1974).

<sup>19</sup>*Id.* §§ 8-1-3-1 through -12 (Burns 1973).

<sup>20</sup>*Id.* § 8-1-3-4 contemplates that the reviewing court shall have available the entire Public Service Commission record, but section 8-1-3-7 merely mandates the reviewing court not to consider evidence beyond the record. Similarly, section 4-22-1-4 contemplates that a reviewing court shall have available the entire agency record, but section 4-22-1-18 merely states that "the facts shall be considered and determined exclusively upon the record filed with the court."

<sup>21</sup>*Transport Motor Express, Inc. v. Smith*, 289 N.E.2d 737 (Ind. Ct. App. 1972), *rev'd on other grounds*, 311 N.E.2d 424 (Ind. 1974), discussed in *Administrative Law, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973).

and the reasonableness of the board's inferences. In *DeMichaeli & Associates v. Sanders*,<sup>22</sup> the court found that the Industrial Board's findings of fact, while "hardly a model of specificity," were sufficient to indicate the factual bases of the board's conclusion.<sup>23</sup> The board had concluded that the appellee's deceased had died as the result of injuries sustained in an automobile collision, and that the injuries were not proximately caused by his commission of a misdemeanor—a finding which would have barred recovery.<sup>24</sup> The specific factual bases for the board's conclusion were: (1) Betty Estes, the driver of the other automobile involved in the fatal collision, was traveling north and had the right of way; (2) the decedent was traveling west toward a stop sign; (3) Betty Estes believed that the decedent's automobile was braking at the intersection; (4) Betty Estes did not see the decedent fail to stop at the intersection. The board found that there was an "inference . . . that the decedent did not stop . . . at the posted stop sign . . . or, if he did stop, he did not grant the right-of-way to the vehicle driven by Betty L. Estes"<sup>25</sup> but awarded compensation to the appellee because "the defendant has failed to prove that this misdemeanor, even if shown, proximately caused the decedent's death."<sup>26</sup>

The court of appeals, with Judge Buchanan writing the majority opinion, held that the board had rejected the only reasonable inference: that the decedent had committed a misdemeanor which was the proximate cause of his death.<sup>27</sup> Consequently, the court substituted judgment.<sup>28</sup>

In *Board of Commissioners v. Dudley*,<sup>29</sup> the court of appeals

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<sup>22</sup>340 N.E.2d 796 (Ind. Ct. App. 1976). This case is also discussed in *Workmen's Compensation*, *infra*.

<sup>23</sup>340 N.E.2d at 801.

<sup>24</sup>IND. CODE § 22-3-2-8 (Burns 1974) provides, in pertinent part, that "no compensation shall be allowed for any injury or death due to the employee's . . . commission of a . . . misdemeanor."

<sup>25</sup>340 N.E.2d at 800.

<sup>26</sup>*Id.*

<sup>27</sup>The court stated,

The Board's findings are remarkable. Reading them one is reminded of a trained horse who has methodically cleared each jump in the obstacle course and would logically be expected to sail over the last easy hurdle, but suddenly veers off on a frolic of his own.

*Id.* at 801.

<sup>28</sup>Indiana courts have held that the reviewing court may vacate an incorrect agency action, but does not have the power to compel agency action by a direct order. The court must instead remand the cause for rehearing. *Indiana State Teachers Retirement Bd. v. Smock*, 332 N.E.2d 800 (Ind. Ct. App. 1975); *Indiana Alcoholic Beverage Comm'n v. Johnson*, 303 N.E.2d 64 (Ind. Ct. App. 1973).

<sup>29</sup>340 N.E.2d 808 (Ind. Ct. App. 1976).

initially followed the same course. The board had found that the plaintiff-employee was entitled to compensation for injuries sustained in an automobile collision notwithstanding evidence that a blood sample drawn by a police officer at the scene of the accident revealed an alcohol content of .41 percent.<sup>30</sup> The court of appeals, reiterating the familiar rule that when the only reasonable inference from the evidence is contrary to the board's conclusion the question of fact is transformed into a question of law which the reviewing court may decide,<sup>31</sup> substituted judgment.<sup>32</sup> Judge White dissented from the rationale of the majority's opinion but concurred in the reversal because "the Industrial Board made no findings of fact, either general or special," but merely "recited the evidence relevant thereto."<sup>33</sup>

On rehearing,<sup>34</sup> the court of appeals vacated its first decision. The court, through Judge Sullivan, held that since the board did not make findings of fact on the claimant's intoxication, the case should be remanded to the board for a finding on that issue. Judge Buchanan, author of the first opinion, vigorously dissented. Stating that the decision of the board clearly implied a finding that the plaintiff was intoxicated, Judge Buchanan saw no reason to remand since the board's decision to grant compensation was clearly a conclusion contrary to the board's implied finding of intoxication.<sup>35</sup>

The board's findings in *Dudley* did not expressly state a conclusion that the plaintiff-employee was or was not intoxicated. To that extent, the *Dudley* findings were not as specific as those of the board in *DeMichaeli*. One may conclude from these cases that the Second District Court of Appeals is continuing to adhere to its strict requirement of specific findings of fact enunciated

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<sup>30</sup>IND. CODE § 9-4-1-56 (Burns 1973) recognizes that a blood alcohol level of .10 percent is "prima facie evidence" that the defendant is under the influence of alcohol. IND. CODE § 22-3-2-8 (Burns 1974) provides that no compensation shall be allowed when injury is caused by an employee's intoxication.

<sup>31</sup>4 K. DAVIS, *supra* note 8, § 29.05, at 139-41.

<sup>32</sup>340 N.E.2d at 814. The court in reaching its conclusion repeatedly cited *DeMichaeli* and *Assoc. v. Sanders*, 340 N.E.2d 796 (Ind. Ct. App. 1976), discussed at text accompanying notes 22-28 *supra*.

<sup>33</sup>340 N.E.2d at 814 (White, J., concurring and dissenting).

<sup>34</sup>344 N.E.2d 853 (Ind. Ct. App. 1976).

<sup>35</sup>*Id.* at 856 (Buchanan, J., dissenting). Judge Buchanan, in the original decision, had also indicated his belief that "[t]he Board necessarily concluded that *Dudley's* blood alcohol level was .41%." 340 N.E.2d at 814.

in *Transport Motor Express, Inc. v. Smith*,<sup>36</sup> in spite of the Indiana Supreme Court's subsequent reversal of *Transport*.<sup>37</sup> The supreme court did not specifically disapprove of the court of appeals' requirement of specificity in *Transport*,<sup>38</sup> but reversed because the court of appeals demanded specific facts which could not legally change the conclusion of the Industrial Commission.<sup>39</sup> Since the board on remand in *Dudley* could change its decision, the court of appeals' remand is technically consistent with the supreme court opinion in *Transport*. However, *Transport* can be read to stand for the proposition that a reviewing court may make factual inferences.<sup>40</sup> With this interpretation, the court of appeals' decision in *Dudley* is questionable.

In *City of Indianapolis v. Nickel*,<sup>41</sup> the Second District Court of Appeals held that the findings of a board of public improvement, unlike those of other administrative agencies, may be supported solely by evidence developed outside of formal proceedings. The court's precedent for the decision was the 1910 Indiana Supreme Court decision in *Johnson v. City of Indianapolis*<sup>42</sup> that in determining public improvement benefit assessments boards of public improvement may rely on their own expertise as well as evidence formally presented to them. In *Nickel*, the court extended the *Johnson* rule to the adoption of the final assessment roll.

### C. Exhaustion of Administrative Remedies

Before relief can be sought in the courts, the plaintiff must first take advantage of any available administrative remedy.<sup>43</sup> An exception to the Indiana statute requiring exhaustion of administrative remedies as a prerequisite to judicial review of public

<sup>36</sup>289 N.E.2d 737 (Ind. Ct. App. 1972), discussed in *Administrative Law, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 2, 6-11 (1973), and Taylor, *Administrative Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 12, 12-13 (1974).

<sup>37</sup>311 N.E.2d 424 (Ind. 1974), discussed in Taylor, *supra* note 36, at 12-13.

<sup>38</sup>"The Court of Appeals has correctly stated the law, but has failed to apply that law to the facts in the case at bar." 311 N.E.2d at 425.

<sup>39</sup>"[N]either this Court nor the Court of Appeals should concern itself with 'facts' which had been presented and argued by the trucking company [which are irrelevant as a matter of law to the decision of the Board.]" *Id.* at 428.

<sup>40</sup>Taylor, *supra* note 36, at 13.

<sup>41</sup>331 N.E.2d 760 (Ind. Ct. App. 1975).

<sup>42</sup>174 Ind. 691, 93 N.E. 17 (1910). The rationale for the rule is that the purpose of the statutory provision is to permit the board on its own judgment to plan and carry out local improvements [IND. CODE § 19-2-16-1 (Burns 1974)] would be defeated if the board could not decide the question of benefits from its own expertise. 174 Ind. at 703, 93 N.E. at 23.

<sup>43</sup>See generally K. DAVIS, *supra* note 8, § 20.01, at 56.



improvement contracts was clarified by the Third District Court of Appeals in *Broomes v. City of East Chicago*.<sup>44</sup> In *Broomes*, taxpayers brought a public lawsuit alleging that a contract between the defendant-appellees and a construction company was procured through the company's fraud and failure to follow appropriate bidding procedures. Plaintiff-appellants sought injunctive relief to prevent the performance of the construction contract and a declaratory judgment holding the contract illegal and void. The trial court held for the defendants, finding that the plaintiffs had failed to exhaust their administrative remedies. The court of appeals construed the statutory requirement that a plaintiff must exhaust the administrative remedies available to him before bringing a public lawsuit<sup>45</sup> to be applicable only when some statutory remedy is available before the municipal body.<sup>46</sup> Finding that there is no remedy applicable to the submission of bids,<sup>47</sup> the court of appeals reversed the decision of the trial court.

The statutory prohibition against putting in issue at a public lawsuit any substantive or procedural matters which the plaintiff "could have but did not raise" at a required administrative hearing<sup>48</sup> was also considered in *Broomes*. Noting that there was "no contention that the City was required to hold a public hearing on the subject of the reception of bids for the improvements,"<sup>49</sup> the court of appeals held that the issue of the legality of the contract was properly before the court.

The court of appeals faced a similar question and implied a similar result during the previous survey period. In *Brutus v. Wright*,<sup>50</sup> a required hearing had been held but there had been no discussion of bidding procedure at the hearing.<sup>51</sup> The court of

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<sup>44</sup>342 N.E.2d 893 (Ind. Ct. App. 1976).

<sup>45</sup>IND. CODE § 34-4-17-8(b) (Burns 1973).

<sup>46</sup>The statute specifically requires exhaustion of "administrative remedies available . . . under applicable law . . ." *Id.*

<sup>47</sup>The court stated that the reception of bids by a municipal body is "arguably a ministerial act under [IND. CODE § 19-7-4-21(b) (Burns 1974)] notwithstanding the requirement of [IND. CODE § 5-16-2-1 (Burns 1974)], that such reception be made at an open and public meeting." 342 N.E.2d at 895.

<sup>48</sup>IND. CODE § 34-4-17-8(c) (Burns 1974) states in pertinent part:

Where as a condition precedent to the construction, financing or leasing of a public improvement the municipal corporation is required to hold a public hearing . . . the plaintiff in a public lawsuit shall not be entitled to raise any issue in the public lawsuit which he could have but did not raise at such hearing . . . .

<sup>49</sup>342 N.E.2d at 895.

<sup>50</sup>324 N.E.2d 165 (Ind. Ct. App. 1975). For a discussion of this case, see Marsh, *Administrative Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 14, 24-25 (1975).

<sup>51</sup>See 324 N.E.2d at 167, 168.



appeals carefully considered the requirement of exhaustion of administrative remedies and upheld the trial court's summary judgment against the plaintiff on the issues of emergency school construction appropriations and bond issues. However, summary judgment on the issue of bidding procedures was reversed without discussion of the exhaustion requirement. In light of *Brutus* and *Broomes*, it is clear that there is no exhaustion requirement when bids are challenged.<sup>52</sup>

*State ex rel. Paynter v. Marion County Superior Court*<sup>53</sup> was an original action seeking a writ to prevent the superior court from enforcing an order prohibiting the Indiana Health Facilities Council of the State Board of Health from conducting an investigation to determine whether a health facility was being operated in violation of the Health Facilities Licensing and Regulation Act.<sup>54</sup> The supreme court, in granting the writ, first stated the general rule that an administrative process which adequately provides for judicial review must be allowed to run its course before judicial intervention is appropriate.<sup>55</sup> The court then determined that the statutory provision for investigations<sup>56</sup> is jurisdictional in nature<sup>57</sup> and is therefore subject to judicial review pursuant to the Administrative Adjudication Act.<sup>58</sup> The court therefore held that the legal question of whether the health facility was being operated in violation of law must be determined initially by the council.<sup>59</sup> *Paynter* demonstrates that the supreme court will not allow the equitable powers of a court to circumvent the requirement of exhaustion of administrative remedies.<sup>60</sup>

The court also extended the rule of *State v. Frye*,<sup>61</sup> in which the First District Court of Appeals held that a petitioner must seek enforcement of a discovery order from the agency as a prerequisite to seeking judicial enforcement. *Paynter* held that an individual cannot challenge in court an agency's discovery

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<sup>52</sup>*Cf. Marsh, supra* note 50, at 25.

<sup>53</sup>344 N.E.2d 846 (Ind. 1976).

<sup>54</sup>IND. CODE §§ 16-10-2-1 to -19 (Burns 1973).

<sup>55</sup>*Public Serv. Comm'n v. City of Indianapolis*, 235 Ind. 70, 131 N.E.2d 308 (1956); *Ballmon v. Duffecy*, 230 Ind. 220, 102 N.E.2d 646 (1952); *State ex rel. White v. Hilgemann*, 218 Ind. 572, 34 N.E.2d 129 (1941).

<sup>56</sup>IND. CODE § 16-10-2-7 (Burns 1973).

<sup>57</sup>*See* 344 N.E.2d at 849.

<sup>58</sup>IND. CODE § 4-22-1-14 (Burns 1974).

<sup>59</sup>344 N.E.2d at 846.

<sup>60</sup>The court cited the leading federal case on exhaustion, *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), for the proposition that "this principle cannot be circumvented by merely asserting that the investigation by the administrative agency is groundless." 344 N.E.2d at 851.

<sup>61</sup>315 N.E.2d 399 (Ind. Ct. App. 1974), *discussed in Marsh, supra* note 50, at 25-26.

order on the grounds that the order violates the individual's "privilege" unless the individual has first asserted the privilege in the agency's proceedings.<sup>62</sup>

#### *D. Standing To Secure Judicial Review*

A litigant cannot obtain judicial review by Indiana courts of an agency's action unless the litigant has suffered an injury as a result of the agency's action or is authorized by statute to sue. During the survey period, a restrictive view of standing was taken in three Indiana cases. In *Sekerez v. Youngstown Sheet & Tube Co.*<sup>63</sup> the plaintiff, alleging that the defendant was discharging chemicals into the air and polluting the environment, sought relief pursuant to Indiana Code section 13-6-1-1, which permits a private party to bring an action for declaratory and equitable relief in the name of the state to protect the state's environment from "significant pollution." The act further provides that a private plaintiff must, as a condition precedent to bringing the action, give notice to the state attorney general, who is then required to notify the agency having jurisdiction over the protection of the environment. Then, "[i]f the agency fails to hold a hearing and make a final determination within one hundred eighty [180] days after receipt of notice by the attorney general . . . an action may be maintained."<sup>64</sup>

The plaintiff in *Sekerez* gave the requisite notice; and the agency, although it did not hold a hearing, issued a formal order compelling Youngstown to take certain actions. The Third District Court of Appeals affirmed the trial court's dismissal of the action, holding that the agency's failure to conduct a hearing did not confer standing to sue on plaintiff. Section 13-6-1-1, the court of appeals explained, requires *both* the failure to hold a hearing *and* the failure to make a final determination within 180 days. Therefore, since the agency had issued a final order, the plaintiff could not sue under that statute.

The court of appeals also held that the plaintiff did not have standing to sue under Indiana Code section 13-7-11-2(b), which confers standing if the agency has either "failed to proceed" or to make a final determination.<sup>65</sup> This section thus differs from

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<sup>62</sup>344 N.E.2d at 849-50.

<sup>63</sup>337 N.E.2d 521 (Ind. Ct. App. 1975).

<sup>64</sup>IND. CODE § 13-6-1-1 (Burns 1973).

<sup>65</sup>

Any person who has filed a complaint pursuant to IC 1971, 13-6-1-1 to, and including, 13-6-1-6 may, if the board or agency has either (a) refused to proceed, or (b) one hundred eighty [180] days have elapsed from the filing of the complaint without a final determination,

Indiana Code section 13-6-1-1, which requires both conditions to be satisfied. The court gave a liberal definition to the term "failed to proceed," construing it to mean failure to take any action. The court's decision is puzzling because it renders meaningless the second condition of the section, the failure to reach a final determination. Under this view the second condition would seem to be encompassed by the broader first condition, "failed to proceed."

The court, by so defining "failed to proceed," denied the plaintiff his opportunity to proceed under the environmental statutes. The court noted that the plaintiff was not left without a remedy since he was free to seek relief pursuant to the provisions of the Administrative Adjudication Act.<sup>66</sup> What the court did not note, however, was that Sekerez was left without any right of recourse to the courts since the Act requires a petition for judicial review to be filed within fifteen days after receiving notice of the agency's order, decision, or determination.<sup>67</sup> In addition, even if judicial review of the agency's action were available, it would be a more limited review than would be available in a judicial action brought under the environmental statutes.<sup>68</sup>

In a different case involving the same plaintiff, *State ex rel. Sekerez v. Lake Superior Court*,<sup>69</sup> the Indiana Supreme Court indicated its displeasure with vexatious actions brought pursuant to the public lawsuit statute.<sup>70</sup> The public lawsuit statute grants standing to individuals to challenge, on behalf of all citizens, the location, feasibility, and validity of public improvements.<sup>71</sup> The plaintiff had three times filed suits under the statute challenging the construction of a sewage treatment center and three times had his suit dismissed—twice for failure to post bond.<sup>72</sup> The

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proceed against the alleged violator . . . .

*Id.* § 13-7-11-2(b).

<sup>66</sup>337 N.E.2d at 521.

<sup>67</sup>IND. CODE § 4-22-1-14 (Burns 1974) provides in pertinent part: Said petition for review shall be filed within fifteen [15] days after receipt of notice that such order, decision or determination is made by any such agency . . . . Unless a proceeding for review is commenced by so filing such petition within fifteen [15] days any and all rights of judicial review and all rights of recourse to the courts shall terminate.

<sup>68</sup>See text accompanying notes 1-20 *supra*.

<sup>69</sup>335 N.E.2d 199 (Ind. 1975).

<sup>70</sup>IND. CODE §§ 34-4-17-1 to -8 (Burns 1973).

<sup>71</sup>*Id.* § 34-4-17-1(b).

<sup>72</sup>*Id.* § 34-4-17-5 permits the court to require the posting of a bond "payable to defendant for the payment of all damages and costs which may accrue by reason of the filing of the lawsuit in the event the defendant prevails." The statute further provides: "In the event no bond is filed . . . the public

supreme court, denying the plaintiff's motion for a writ prohibiting the enforcement of a superior court order enjoining him from initiating a similar action or appealing the third lawsuit, spoke of the dangers of a public lawsuit. The court stated:

The grant of standing to one who has no legal injury in fact is not without its downside risks. The General Assembly was aware that Machiavellians—who would use the public lawsuit machinery to serve these ends while purportedly suing on behalf of their fellow citizens—live in Utopian communities. The General Assembly was also aware that those with pure hearts but empty heads might bring such lawsuits . . . .<sup>73</sup>

The supreme court also noted the dangers of the public lawsuit in *State ex rel. Eastern Pulaski Community School Corp. v. Pulaski Circuit Court*.<sup>74</sup> In holding that a public lawsuit must be brought within ten days after the first published notice of the sale of bonds,<sup>75</sup> the court conceded that the ten-day limitation on bringing an action was restrictive, but found that the legislature's provision of the limitation was necessitated by the "extreme financial burden which may accrue to local taxing districts because of delays in construction necessitated by the pendency of a public lawsuit."<sup>76</sup> It appears, therefore, that the provisions of the public lawsuit statutes, which grant standing to an individual without a showing of legal injury, will be strictly construed to avoid what the supreme court perceives to be the dangers of such suits.

### E. Due Process

While it has been said that an administrative agency is not a court, the agency nonetheless is compelled to comply with minimum standards of due process.<sup>77</sup> During the survey period

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lawsuit shall be dismissed and no court shall have further jurisdiction of the public lawsuit or any other public lawsuit involving any issue which was or could have been raised therein."

<sup>73</sup>335 N.E.2d at 200.

<sup>74</sup>338 N.E.2d 634 (Ind. 1975).

<sup>75</sup>IND. CODE § 34-4-17-8(a) provides, in pertinent part:

No public lawsuit shall be brought, and no trial court shall have jurisdiction of any public lawsuit which is brought, more than ten [10] days after first publication required by law for the sale of bonds of a municipal corporation, or in the case of a lease, under Acts 1947, c. 273 [21-5-11-1—21-5-11-16 . . .] more than ten [10] days after first publication of notice by any school building corporation for the sale of its bonds . . . .

<sup>76</sup>338 N.E.2d at 636.

<sup>77</sup>*State ex rel. Paynter v. Marion County Superior Court*, 344 N.E.2d 846, 850 (Ind. 1976).

the courts of appeals discussed the due process rights of probationary and special policemen and firemen. In *City of Frankfort v. Logan*,<sup>78</sup> the Second District Court of Appeals upheld the statutory authority of a municipality to discharge a special police officer without cause<sup>79</sup> even though the officer had been in the city's employ for seventeen years. Special police officers do not have the statutory protection of regular policemen, who can be removed only for cause and after written notice.<sup>80</sup> The court also held that the city did not have authority to hire the plaintiff as a regular policeman because he was over the statutorily defined age limit of thirty-five at the time of his special appointment,<sup>81</sup> citing *American Jurisprudence* as authority for the proposition that an ultra vires employment contract by a municipal body is void and unenforceable.<sup>82</sup> The court quoted *American Jurisprudence's* statement that a fully performed municipal contract is unassailable by either party<sup>83</sup> but held that, despite the respondent's long years of service, "[n]o act by the City or by Logan could have transformed . . . [a] void (not voidable) contract into a valid express or implied contract employing him as a regular policeman."<sup>84</sup>

In *Town of Speedway v. Harris*<sup>85</sup> the court of appeals held that the Rules and Regulations of the Speedway Fire Department require notice and a hearing prior to dismissal of any fireman, regular or probationary.<sup>86</sup> The appellee, a probationary fireman, had been discharged without notice or hearing. Finding that the appellant's rules made no distinction between regular and probationary firemen, the appellate court found that the rules gave Harris a "legitimate claim of entitlement" to continued employ-

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<sup>78</sup>341 N.E.2d 510 (Ind. Ct. App. 1976).

<sup>79</sup>IND. CODE § 18-1-11-5 (Burns Supp. 1976).

<sup>80</sup>*Id.* § 18-1-11-3 (Burns 1974).

<sup>81</sup>*Id.* § 19-1-15-1 prohibits the appointment as policeman, in any first through fifth class city, of any individual who has reached his or her 35th birthday.

<sup>82</sup>341 N.E.2d at 514. The rationale for this rule is that every person who deals with a municipal body is expected to know the scope of its statutory authority. 56 AM. JUR. 2D *Municipal Corporations* § 503 (1971).

<sup>83</sup>341 N.E.2d at 514, quoting from 56 AM. JUR. 2D *Municipal Corporations* § 503, at 554-56.

<sup>84</sup>341 N.E.2d at 514.

<sup>85</sup>346 N.E.2d 646 (Ind. Ct. App. 1976).

<sup>86</sup>Article X, Rules and Regulations of the Speedway Fire Department, reprinted at 346 N.E.2d at 647, provides, in pertinent part: "[A]ny member found guilty after a hearing shall, in the discretion of the Board of Town Trustees, be subject to reprimand, suspension from duty, dismissal from the service, or such other penalties as may be determined."

ment.<sup>87</sup> The court distinguished *City of Frankfort* on the basis that the appellee in that case had no property interest protectable by due process.<sup>88</sup> The court then held that due process requires that a hearing be held at a time "when the deprivation [of the appellee's protected property interest] can still be prevented."<sup>89</sup> The court recognized, however, that the prior hearing requirement is not absolute, and that in "extraordinary situations" notice and hearing may be provided subsequent to dismissal.<sup>90</sup> The court stated that such emergency-type situations are limited and must be truly unusual; they exist "only when some valid governmental interest substantially prevails over the individual's constitutional rights involved."<sup>91</sup> The court rejected Speedway's contention that an emergency situation was presented by the public's need for efficient fire protection because no evidence was offered in support of that conclusion.

The court, however, held that since the plaintiff had declined an offer for a hearing the day following dismissal, he had waived his due process rights,<sup>92</sup> and was entitled only to those damages which accrued on the single day between dismissal and the proffered hearing.<sup>93</sup>

Prior to *Town of Speedway*, the First District Court of Appeals held in *Lueken v. City of Huntingburg*<sup>94</sup> that even though Indiana Code section 19-1-3-2 requires a hearing prior to suspension of a fifth-class city policeman, the defendant-city's failure to provide a hearing until after the suspension was not reversible error. The officer was suspended with pay and the city moved quickly to provide notice and to hold a hearing to determine his competency. The court of appeals' decision rested on the Trial Rule 61 mandate that a court must disregard procedural errors not affecting the substantial rights of the parties and on the public

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<sup>87</sup>346 N.E.2d at 650. The court relied on the property interest definitions of the United States Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Flemming v. Nestor*, 363 U.S. 603 (1960); *Slochower v. Board of Educ.*, 350 U.S. 551 (1956); *Wieman v. Updegraff*, 344 U.S. 183 (1952).

<sup>88</sup>346 N.E.2d at 650 n.9.

<sup>89</sup>346 N.E.2d at 651, quoting from *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972).

<sup>90</sup>346 N.E.2d at 652, quoting from *Fuentes v. Shevin*, 407 U.S. at 82.

<sup>91</sup>346 N.E.2d at 652, citing *Fuentes v. Shevin*, 407 U.S. 67; *Boddie v. Connecticut*, 401 U.S. 371 (1971).

<sup>92</sup>346 N.E.2d at 653, citing *D. H. Overmyer Co. v. Frick Co.*, 405 U.S. 174 (1972); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

<sup>93</sup>346 N.E.2d at 654.

<sup>94</sup>335 N.E.2d 239 (Ind. Ct. App. 1975).

policy need to protect the community from the ill effects of having an officer of questionable ability on duty.<sup>95</sup>

The court of appeals acknowledged that the plaintiff had property and liberty interests at stake,<sup>96</sup> both of which are entitled to fourteenth amendment protection.<sup>97</sup> Therefore, the court's reliance on Trial Rule 61 is questionable, since procedures affecting fourteenth amendment interests surely affect substantial rights within the meaning of the rule. The court's failure to discuss the constitutional issue of whether the plaintiff was entitled to due process at a meaningful time<sup>98</sup> is also questionable. The only factual distinction between *Lueken* and *Town of Speedway* is that Lueken was suspended with pay and the plaintiff in *Town of Speedway* was dismissed, a distinction which could not have been clear enough to warrant lack of consideration of a constitutional issue by an appellate court.

Prior to this survey period, it had been held that probationary police officers and firemen were entitled to the full protection of Indiana Code section 18-1-11-3.<sup>99</sup> This section entitles a fireman or police officer to notice and a hearing prior to dismissal and for appeal of the agency's decision to dismiss. If the board's decision is reversed, the officer is entitled to withheld salary without mitigation or setoff for amounts earned from other employment. In contrast, if dismissal was not within the scope of section 18-1-11-3, the common law doctrine of mitigation of damages applies.<sup>100</sup> The Third District Court of Appeals in *Town of Highland v. Powell*<sup>101</sup> applied this prior law in affirming a trial court's judgment for a probationary policeman who had been dismissed without the statutory procedure. The town argued that the lawsuit was not an appeal within the meaning of the statute but was a common law breach of contract suit calling for a common law remedy. The appellate court rejected this argument, concluding that the decision of the board to dismiss was the only requirement necessary to establish the statutory right to judicial review and

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<sup>95</sup>*Id.* at 241.

<sup>96</sup>*Id.*

<sup>97</sup>*See, e.g.,* cases cited note 87 *supra*.

<sup>98</sup>*See* text accompanying notes 89-91 *supra*.

<sup>99</sup>*Morris v. City of Evansville*, 152 Ind. App. 50, 57, 281 N.E.2d 910, 915 (1972). However, this protection does not extend to special police officers, who are governed by IND. CODE § 18-1-11-5 (Burns Supp. 1976). *See City of Frankfort v. Logan*, 341 N.E.2d 510 (Ind. Ct. App. 1976), discussed at text accompanying notes 78-84 *supra*.

<sup>100</sup>*See, e.g., Coates v. City of Evansville*, 149 Ind. App. 518, 273 N.E.2d 862 (1971); *cf. City of Frankfort v. Logan*, 341 N.E.2d 510 (Ind. Ct. App. 1976).

<sup>101</sup>341 N.E.2d 804 (Ind. Ct. App. 1976).



the statutory remedy.<sup>102</sup> The court distinguished *Coates v. City of Evansville*,<sup>103</sup> in which the common law doctrine was applied, on the basis that *Coates* was an appeal from a decision favoring reinstatement, which is not an appealable order.<sup>104</sup>

In two decisions during the survey period, courts refused to extend the holding of *City of Mishawaka v. Stewart*<sup>105</sup> that an administrative board denied a fireman his due process rights when the city attorney, who had served as the fire department's advocate in proceedings before the municipal board determining the fireman's alleged misconduct, also participated as a "judge" in the board's final disposition of the issue. The rationale of the supreme court's decision in *City of Mishawaka* was that the fact-finding process before an administrative board should be free of suspicion or appearance of impropriety.<sup>106</sup> In *Lueken v. City of Huntingburg*,<sup>107</sup> the court held that although the board had prior knowledge of the evidence to be presented against the plaintiff, there was not the obvious display of impropriety present in *City of Mishawaka*. The court stated, "[A] combination of the investigatory and adjudicative functions, without more, comport with due process."<sup>108</sup> As support for its decision, the court of appeals relied upon the recent decision of the United States Supreme Court in *Winthrow v. Larkin*,<sup>109</sup> in which the Court held that due process was not violated when a state medical board was allowed to investigate as well as to adjudicate the revocation of a medical license.

In *State ex rel. Paynter v. Marion County Superior Court*<sup>110</sup> the Indiana Supreme Court held that the appointment as hearing officer of a member of the administrative council which would ultimately decide the case did not "raise such a specter of partiality" as to violate due process under the *City of Mishawaka*

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<sup>102</sup>*Id.* at 809.

<sup>103</sup>152 Ind. App. 50, 273 N.E.2d 862 (1971).

<sup>104</sup>341 N.E.2d at 808-09 n.8. IND. CODE § 18-1-11-3 (Burns 1974) provides, in pertinent part: "Any member of such fire or police force . . . shall have the right to appeal . . . from such decision of dismissal or suspension by said board, but shall not have the right to appeal from any other decision . . . ." In *Coates*, the plaintiff was merely suspended pending disposition of a criminal charge. *Coates* was subsequently reinstated by the board, and the court therefore held that the decision to reinstate was not appealable under the statute. 341 N.E.2d at 809-10 n.8.

<sup>105</sup>310 N.E.2d 65 (Ind. 1974).

<sup>106</sup>*Id.* at 69.

<sup>107</sup>335 N.E.2d 239 (Ind. Ct. App. 1975), discussed at text accompanying notes 94-98 *supra*.

<sup>108</sup>335 N.E.2d at 242.

<sup>109</sup>421 U.S. 35 (1975).

<sup>110</sup>344 N.E.2d 846 (Ind. 1976).



decision<sup>111</sup> since the hearing officer did not perform in an adversary capacity. The court also held that Indiana Attorney General's service as advisor to the council in both its investigative-prosecuting and decision-making roles did not violate due process, since the council was the decision-making body and the Attorney General served only in an advisory capacity.

These cases, when read together with a case from the previous year, *City of Gary v. Gause*,<sup>112</sup> indicate a tendency to limit *City of Mishawaka* to the advocate-judge factual situation. Thus, the administrative board is given more discretion in deciding how to conduct its hearings.

In *Whirlpool Corp. v. State Board of Tax Commissioners*,<sup>113</sup> the First District Court of Appeals was confronted with the issue of whether a three-month tax assessment investigation conducted by the board constituted an administrative hearing. Finding that the investigation was essentially an audit, the court relied on *State Board of Tax Commissioners v. Oliverius*<sup>114</sup> to hold that the investigation did not constitute a hearing for due process purposes. Due process, it was held, requires at a minimum that the taxpayer be provided an "opportunity to meet and rebut adverse evidence or to cross-examine adverse witnesses."<sup>115</sup>

In *City of Evansville v. Southern Indiana Gas & Electric Co.*<sup>116</sup> the court discussed the statutory requirement of public notice of Public Service Commission proceedings. The Public Service Commission Act provides that when a public utility files a petition requesting a rate increase, the utility must "publish a notice of such petition or complaint in a newspaper."<sup>117</sup> The notice filed by the utility and approved by the Commission in *City of Evansville* revealed only that the utility sought a rate increase. The city argued that this was not adequate because the notice did not specifically state that the utility sought a change in depreciation rates.

The Commission's usual practice, which had been followed in this case, was to approve the publication of the caption of the case, describing "in general terms all the relief being sought in the

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<sup>111</sup>*Id.* at 850.

<sup>112</sup>317 N.E.2d 887 (Ind. Ct. App. 1974). The court in *Gause* held that a city attorney could present evidence to a board in support of an employee's discharge as long as he did not participate in the making of the final decision.

<sup>113</sup>338 N.E.2d 501 (Ind. Ct. App. 1975). For a discussion of other issues in this case, see Allington, *Taxation, infra*.

<sup>114</sup>294 N.E.2d 646 (Ind. Ct. App. 1973).

<sup>115</sup>338 N.E.2d at 505.

<sup>116</sup>339 N.E.2d 562 (Ind. Ct. App. 1975). See text accompanying notes 1-10 *supra*.

<sup>117</sup>IND. CODE § 8-1-2-61 (Burns 1973).

petition."<sup>118</sup> The court affirmed this practice, explaining that the matter of notice is left to the Commission's discretion, and approved the Commission's case-by-case method of determining the sufficiency of notice. The court further stated that the "succinct notice" approved by the Commission was preferable to a statement "couched in the technical jargon of the public utility field" which might confuse the public.<sup>119</sup>

### F. Municipal Corporations

Municipal power to regulate was discussed in two cases from the First District Court of Appeals. Advocates for the passage of the Uniform Residential Landlord and Tenant Act suffered a setback in *City of Bloomington v. Chuckney*.<sup>120</sup> The Bloomington Common Council had enacted an ordinance which included some provisions of the uniform act.<sup>121</sup> The court held that portions of Ordinance 72-76 were in conflict with Indiana Code section 18-1-1.5-19. That section, part of the 1971 Power of Cities Act,<sup>122</sup> provides that the enactment of laws "governing private or civil relationships except as an incident to the exercise of an independent municipal power" is reserved exclusively to the state.<sup>123</sup> The court found that, while parts of the ordinance could be upheld as city housing and safety codes incident to the city police powers, many of the ordinance terms did not come within the exception and were thus invalid. Specific examples discussed by the court were provisions mandating inclusion in leases clauses affecting apartment entry, limiting amounts of security deposits, and creating a presumption of preexistent damages from the lessor's failure to execute an inventory or damage list.<sup>124</sup> *City of Bloomington* must be viewed as a limitation of municipal power in light of Indiana Code section 18-1-1.5-23, which calls for a liberal construction of the powers of cities under the Act.<sup>125</sup>

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<sup>118</sup>IND. ADMIN. RULES & REGS. Rule (8-1-2-47) -8(b) (Burns 1976).

<sup>119</sup>339 N.E.2d at 579. The court also stated: "The complexity and varied nature of regulatory proceedings militate against the adoption of a more particularistic notice standard." *Id.* at 578.

<sup>120</sup>331 N.E.2d 780 (Ind. Ct. App. 1975).

<sup>121</sup>*Id.* at 781-82.

<sup>122</sup>IND. CODE §§ 18-1-1.5-1 to -30 (Burns 1974).

<sup>123</sup>*Id.* § 18-1-1.5-19.

<sup>124</sup>331 N.E.2d at 783-84.

<sup>125</sup>IND. CODE § 18-1-1.5-23 (Burns 1974) provides in pertinent part: The powers of cities as defined in this chapter shall be construed liberally in favor of such cities . . . . It is the intention of this chapter and the policy of the state to grant to cities full power and right to exercise all governmental authority necessary for the effective

In *City of Richmond v. S.M.O., Inc.*,<sup>126</sup> the court of appeals, relying on prior case law,<sup>127</sup> found that if the power to regulate an activity is not vested exclusively in the state, a municipality may regulate the activity if it does not impose a less stringent standard than the state.<sup>128</sup> The court then held that both the state and municipalities have the statutory power to regulate curb cuts,<sup>129</sup> but that primary authority rests with the state.<sup>130</sup> Since the appellee had obtained state permission, the appellate court affirmed the trial court's order enjoining the city from barricading the curb cut.<sup>131</sup> *City of Richmond* appears to extend previous law, since the decision indicates that the municipality may not impose standards more stringent than those of the state.

In *Angel v. Behnke*,<sup>132</sup> the Third District Court of Appeals concluded that competitive bidding was not required for a county's lease of data processing equipment. The court "reluctantly" reached this decision, although it recognized that "large rental fees, as in the present case, should be covered by competitive bidding requirements."<sup>133</sup> The court nonetheless found that the lease did not fall within the statutes requiring competitive bidding for leases.<sup>134</sup>

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operation and conduct of government with respect to their municipal and internal affairs.

<sup>126</sup>333 N.E.2d 797 (Ind. Ct. App. 1975).

<sup>127</sup>*Hollywood Theater Corp. v. City of Indianapolis*, 218 Ind. 556, 34 N.E.2d 28 (1941); *Medias v. City of Indianapolis*, 216 Ind. 155, 23 N.E.2d 509 (1939); *Spitler v. Town of Munster*, 214 Ind. 75, 14 N.E.2d 579 (1938); *Cooper v. City of Greenwood*, 169 Ind. 14, 81 N.E. 56 (1907).

<sup>128</sup>333 N.E.2d at 798.

<sup>129</sup>The court found that Indiana Code section 9-4-1-119 (Burns 1973), mandating the state highway commission to promulgate "regulations and requirements," was the "genesis" of the state's authority to regulate curb cuts. 333 N.E.2d at 798. The city's power to regulate was found in IND. ADMIN. RULES & REGS. Rule (9-4-1-119) -12 (Burns 1976).

<sup>130</sup>*Id.*

<sup>131</sup>*Id.* The court also held that municipal ordinances requiring permits for work to be done on municipal streets and making the obstruction or injury of streets an unlawful act were insufficient to satisfy the due process requirement that the city must inform the property owner of the standards utilized in granting or denying a curb cut. *Id.*

<sup>132</sup>337 N.E.2d 503 (Ind. Ct. App. 1975).

<sup>133</sup>*Id.* at 509.

<sup>134</sup>IND. CODE § 5-16-1-1 (Burns 1974) provides, in pertinent part:

When any public building or any other public work or improvement of any character whatsoever is to be constructed, erected, altered or repaired at the expense of the state or at the expense of any county . . . and when the estimated costs of such work or improvement will be five thousand dollars [\$5,000] or more, it shall be the duty of the board . . . to adopt plans and specifications and award a contract for such public work or improvement to the lowest and best bidder who submits a bid for the performance thereof . . . . Provided, however, that notwithstanding any other provisions of law, the board of county

The court also decided not to construe the Public Purchases Act<sup>135</sup> to include leases as a matter of public policy, although other jurisdictions have done so,<sup>136</sup> because a study of the legislative history of the Act and of other competitive bidding statutes indicated no legislative intent to require competitive bidding for leases.<sup>137</sup>

The Indiana Supreme Court, in *Board of Commissioners v. Kokomo City Plan Commission*,<sup>138</sup> discussed the standing of municipalities and counties to challenge state legislation. The court reversed a Second District Court of Appeals decision<sup>139</sup> holding that a statute allowing cities in counties of less than 84,000 residents to exercise extraterritorial jurisdiction without the consent of the county<sup>140</sup> violated article 4, section 23 of the Indiana Constitution.<sup>141</sup> The supreme court did not decide the merits of the constitutional issue, but held that the county, having suffered no injury, did not have standing to sue.<sup>142</sup>

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commissioners, acting on behalf of any county . . . may purchase materials in the manner provided by law and perform any work by means of its own workmen and owned or leased equipment in the construction, maintenance, and repair of any highway, bridge, or culvert without awarding a contract therefor . . . . When the work involves the rental of equipment with an operator furnished by the owner . . . such work shall be deemed to be public work and subject to the provisions of this section . . . .

The court reasoned that the data processing equipment was not a "public building or any other public work or improvement," nor did the lease involve a "highway, bridge, or culvert," and that the statute therefore was inapplicable in the present case. 337 N.E.2d at 509.

<sup>135</sup>IND. CODE §§ 5-17-1-1 to -9 (Burns 1974). *Id.* § 5-17-1-1 provides, in pertinent part: "Any person, officers, board, commissioner . . . duly authorized . . . to make purchase of material or materials, equipment, goods and supplies . . . shall comply with [IND. CODE § 5-17-1-2 (Burns 1974), requiring competitive bidding] . . . ."

<sup>136</sup>337 N.E.2d at 510, citing *Galloway v. Road Improvement Dist. No. 4*, 143 Ark. 338, 220 S.W. 450 (1920); *State ex rel. Small v. Hughes County Comm'n*, 81 S.D. 238, 133 N.W.2d 228 (1965).

<sup>137</sup>337 N.E.2d at 510-11.

<sup>138</sup>330 N.E.2d 92 (Ind. 1975).

<sup>139</sup>*Board of Comm'rs v. Kokomo City Plan Comm'n*, 310 N.E.2d 877 (Ind. Ct. App. 1974).

<sup>140</sup>IND. CODE § 18-7-5-34 (Burns 1974).

<sup>141</sup>"In all the cases enumerated in the preceding Section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State." IND. CONST. art. 4, § 23.

<sup>142</sup>330 N.E.2d at 100-01. For a discussion of the constitutional issues in this case, see Marsh, *Constitutional Law*, *infra*.

### III. Business Associations

*Paul J. Galanti\**

There were four judicial decisions during the period covered by this survey worth noting.<sup>1</sup> However, there were only minor legislative developments.

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The author wishes to express his appreciation to Douglas J. Atz and Stephen R. Nelson for their assistance in preparing this survey.

<sup>1</sup>There were several cases warranting a passing reference. One is *Trifunovic v. Marich*, 343 N.E.2d 825 (Ind. Ct. App. 1976), affirming a judgment denying Trifunovic's claim for half of the capital loss of an investment partnership. The arrangement contemplated Trifunovic furnishing the capital and Marich making the investment decisions. Marich's skills were questionable and most of the capital was lost. The court recognized that the Indiana Uniform Partnership Act contemplates partners sharing partnership losses, IND. CODE § 23-4-1-18(a) (Burns 1972), and that a partner has a right of contribution from other partners. *Id.* § 23-4-1-40(d),(f). See *Goldstein v. Burstein*, 185 Cal. App. 2d 725, 8 Cal. Rptr. 574 (1960); see generally J. CRANE & A. BROMBERG, PARTNERSHIP §§ 65(a), 90 (1968). These obligations can be modified by agreement, and the court concluded the agreement of the parties contemplated Marich would not be bound to share in the losses. See *Petersen v. Petersen*, 284 Minn. 61, 169 N.W.2d 228 (1969); see generally J. CRANE & A. BROMBERG, *supra* § 65.

A contractee's liability for the negligence of an independent contractor was in issue in *Hale v. Peabody Coal Co.*, 343 N.E.2d 316 (Ind. Ct. App. 1976). Hale was employed by a subcontractor of a contractor selected by Peabody for a construction project. He was injured in a fall from a scaffold. Summary judgment for defendants was affirmed. The court held that Hale's employer was an independent contractor and not a servant of defendants because they retained only general supervisory control over the work, *Prest-O-Lite Co. v. Skeel*, 182 Ind. 593, 106 N.E. 365 (1914); and that he was not within the various exceptions to the general rule that a contractee is not vicariously liable to the servants of an independent contractor. See generally W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 71 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS §§ 409-29 (1965). The court also rejected Hale's claim that defendants were personally negligent, concluding they had provided a safe place to work and Hale's injury was caused by a fall from facilities owned and maintained solely by his employer. See generally W. PROSSER, *supra* at 469-70; RESTATEMENT (SECOND) OF TORTS § 413 (1965).

In *Day v. State*, 341 N.E.2d 209 (Ind. Ct. App. 1976), the court reversed the conviction of the president of a professional association for failing to file the required expense statement for a lobbyist. He had not paid the lobbyist personally and so was not obligated to file the report. The court refused to construe IND. CODE § 2-4-3-4 (Burns 1972) to impose a filing duty on all officers or members of the association who knew of the payments since the legislature considered the unincorporated association to be a separate legal entity apart from its members. Consequently, the association itself could be

### A. Restraint of Trade

An unusual, but interesting, case is *Citizens National Bank v. First National Bank*,<sup>2</sup> in which the Second District Court of Appeals reversed and remanded a decision of the Wells Circuit Court granting the defendants' motions to dismiss. *Citizens* is a *rara avis*, one of the few reported treble damage actions brought under the Indiana Antitrust Act.<sup>3</sup> The suit culminated Citizens' efforts to open a banking office in Marion, where the two defendants operate.

Although Citizens' efforts began before 1966 it did not succeed until 1970. Its initial attempt was as a state bank in Van Buren and failed because the Indiana Financial Institutions Act bars branch banks in cities the size of Marion already served by existing banks.<sup>4</sup> Citizens then tried a new tack and petitioned the United States Comptroller of the Currency to become a na-

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finee for failing to file the requisite report, *United States v. A & P Trucking Co.*, 358 U.S. 121 (1958), but not an individual officer innocent of the infraction.

A case emphasizing the risks of ignoring corporateness is *Smith v. Kinney*, 338 N.E.2d 507 (Ind. Ct. App. 1975), affirming a directed verdict for defendant. Smith claimed injury from Kinney's undisclosed conflict of interest in a land annexation proceeding. His mistake was to sue in his own name although the title to the land was in a corporation he owned. The corporation, of course, is a separate entity apart from its shareholders, *Benner-Coryell Lumber Co. v. Indiana Unemployment Compensation Bd.*, 218 Ind. 20, 29 N.E.2d 776 (1940); and consequently a shareholder under ordinary circumstances cannot for convenience ignore the corporation and recover on claims belonging to the corporation. See *Progress Tailoring Co. v. FTC*, 153 F.2d 103 (7th Cir. 1946); *Cutshaw v. Fargo*, 8 Ind. App. 691, 34 N.E. 376 (1893); see generally 6 Z. CAVITCH, *BUSINESS ORGANIZATIONS* § 118.02 (rev. ed. 1976) [hereinafter cited as CAVITCH]; 1 W. FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 25 (rev. vol. 1974) [hereinafter cited as FLETCHER]; H. HENN, *HANDBOOK OF THE LAW OF CORPORATIONS* §§ 149, 151 (2d ed. 1970) [hereinafter cited as HENN]; N. LATTIN, *THE LAW OF CORPORATIONS* §§ 12-14 (2d ed. 1971) [hereinafter cited as LATTIN]; Comment, *Corporations: Disregard of the Corporate Entity for the Benefit of Shareholders*, 1963 DUKE L.J. 722.

<sup>2</sup>331 N.E.2d 471 (Ind. Ct. App. 1975) (Sullivan, P.J.).

<sup>3</sup>IND. CODE §§ 24-1-2-1 to -12 (Burns 1974). The Indiana Code contains other provisions relating to anticompetitive conduct. *Id.* §§ 24-1-1-1 to -6; -3-1 to -5; and -4-1 to -4. Although the bulk of antitrust litigation is federal, 16J J. VON KALINOWSKI, *BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION* § 81.01[5] (rev. ed. 1976) [hereinafter cited as VON KALINOWSKI], state antitrust laws do serve a valid supplementing purpose. E. KINTNER, *AN ANTITRUST PRIMER* 159-63 (2d ed. 1973). There is no federal preemption of state antitrust laws. *Standard Oil Co. v. Tennessee*, 217 U.S. 413 (1910).

<sup>4</sup>IND. CODE § 28-1-17-1 (Burns 1974). See generally Note, *Branch Banking*, 38 NOTRE DAME LAW. 315 (1963).

tional banking association<sup>5</sup> with a main office in Marion and a branch in Van Buren. The Comptroller solicited comments from the defendants, who, not surprisingly, objected to another bank in Marion. Their objections were to no avail, and the Comptroller granted preliminary approval of the application. The defendants then sought injunctive relief in the federal courts, contending that designating Marion as the "main office" was a ploy to circumvent the federal ban against branch banks where state banks are barred under state law.<sup>6</sup> The district court agreed and enjoined the Comptroller.<sup>7</sup> The Seventh Circuit modified and affirmed the injunction,<sup>8</sup> and eventually Citizens opened a Marion office in March 1970.

Citizens, however, was not satisfied and in early 1971 filed suit in the Grant Superior Court alleging that the defendants had conspired and schemed to restrain banking in Marion in violation of the Indiana Antitrust Act.<sup>9</sup> This alleged conspiracy primarily stemmed from the defendants' intervention in the Comptroller's proceeding and subsequent suit for injunctive relief, actions aimed at keeping Citizens from the Marion market and done with the intent and design to monopolize that market. Fortunately Citizens alleged in a "catchall" paragraph 6 of the complaint that the defendants did "other acts and things" to further their objective of keeping banking competition from Marion and its environs.<sup>10</sup>

<sup>5</sup>12 U.S.C. § 35 (1970) sets forth the requirements a state bank must meet to become a national banking association. *Id.* § 30 authorizes a national bank to relocate in certain circumstances with the Comptroller's approval. See *Traverse City State Bank v. Empire Nat'l Bank*, 228 F. Supp. 984 (W.D. Mich. 1964).

<sup>6</sup>12 U.S.C. § 36(c) (1970). See *Union Savings Bank v. Saxon*, 335 F.2d 718 (D.C. Cir. 1964). Federal law determines whether a banking facility of a national banking association is a branch. *Virginia ex rel. State Corp. Comm'n v. Farmers & Merchants Nat'l Bank*, 515 F.2d 154 (4th Cir. 1975). For a discussion of the history and purposes of the federal policy on branch banks, see *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252, 256-62 (1966).

<sup>7</sup>*Marion Nat'l Bank v. Saxon*, 261 F. Supp. 373 (N.D. Ind. 1966).

<sup>8</sup>*Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969). The modification authorized Citizens to drop the Van Buren "branch" request from the application, thus eliminating the section 36(c) issue raised by the defendants in their district court injunction suit, 261 F. Supp. 373. However, there appears to be a Van Buren branch. 331 N.E.2d at 474.

<sup>9</sup>IND. CODE § 24-1-2-1 (Burns 1974) prohibits combinations in restraint of trade or to prevent competition. *Id.* § 24-1-2-2 prohibits monopolization and attempts to monopolize. *Dye v. Carmichael Produce Co.*, 64 Ind. App. 653, 116 N.E. 425 (1917). Services as well as commodities are covered by the Act. *Fort Wayne Cleaners & Dyers Ass'n v. Price*, 127 Ind. App. 13, 137 N.E.2d 738 (1956). See generally Note, *Price-Fixing Within the Barber Industry*, 34 IND. L.J. 621 (1959).

<sup>10</sup>331 N.E.2d at 474.



Citizens claimed defendants' acts caused it to lose the profits it would have earned during the interim between approval of its application and opening of the banking office, and prayed for treble damages, as provided by the Act,<sup>11</sup> of \$2,850,000.

The defendants removed the suit to the United States District Court for the Northern District of Indiana, and Citizens moved to remand the cause to the state court. Subsequently, the defendants filed separate motions to dismiss for failure to state a claim. However, the court did not rule on them before remanding the suit to the Grant Superior Court. One defendant filed a supplemental brief in the state court in support of its motion to dismiss. Citizens then moved for a default judgment, claiming that no timely responsive pleadings had been filed since the motions to dismiss had not been refiled after remand. The venue of the case was changed to the Wells Circuit Court, which overruled Citizens' motion for default and granted defendants' motions to dismiss. One motion was granted by applying *res judicata* and the other on several substantive and procedural grounds, the most significant of which were that: (1) Citizens had not sustained injury to any legal right; (2) it had failed to allege any public injury or unreasonable restraint of trade; and (3) defendants' acts were constitutionally protected from antitrust challenge.<sup>12</sup>

The first issue decided by the appellate court was whether the motions to dismiss were properly before the trial court after remand. The court, relying on *Riehl v. National Mutual Insur-*

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<sup>11</sup>IND. CODE § 24-1-2-7 (Burns 1974) authorizes treble damage actions plus costs of suit and reasonable attorneys' fees. There was an unexplained discrepancy in the figures for Citizens' anticipated yearly profits, the profits for the three and one-half year period covered by the suit, and the total damages claimed. However, in federal antitrust cases all a plaintiff must do is establish with reasonable probability a causal connection between defendant's act and a loss of anticipated revenue. *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Once this is done, the trier of fact can fix damages by "a just and reasonable estimate . . . based on relevant data." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946). Difficulty in determining damages is not an excuse for denying recovery. *Id.* at 265-66. The injury suffered, however, must be measurable in dollars. *See generally* ABA ANTITRUST LAW DEVELOPMENTS 285 (1975) [hereinafter cited as ABA 1975 DEVELOPMENTS]; 16N VON KALINOWSKI, *supra* note 3, at § 115.03.

<sup>12</sup>The court stated the appeal presented three issues: (1) whether the motions to dismiss were properly before the trial court; (2) whether the trial court erred in not entering a default judgment; and (3) whether it erred in granting the motions to dismiss. 331 N.E.2d at 476.



*ance Co.*,<sup>13</sup> concluded that the remand of the case was complete and included the filed but unresolved motions to dismiss. At most, the failure to refile was an inconsequential irregularity, and so defendants were not in default.<sup>14</sup> To "cover" itself the court also concluded that even if defendants were in technical default, *Citizens* was not entitled to a default judgment as a matter of law. Although the trial rule<sup>15</sup> then in effect seemed to mandate a default judgment, the court held the decision was within the trial court's discretion, as under present Trial Rule 55.<sup>16</sup>

On the merits, the court held the trial court erred in ruling that *Citizens* had sustained no injury to a legal right and therefore lacked standing to sue. The thrust of defendants' arguments was that the Act<sup>17</sup> protects only those whose "business or property" has been injured and *Citizens* had no such "business or property" until it opened the Marion office. The problem with this position was twofold: it assumed that the only anticompetitive acts alleged related to the Comptroller's proceeding, which fell before paragraph 6 of the complaint; and that there could not be an illegal conspiracy to keep someone from entering a business.

A threshold problem facing the appellate court was the dearth of cases construing the Indiana Antitrust Act. The court therefore relied upon federal decisions from cases involving violations of federal antitrust laws. Although the language of the Indiana Act

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<sup>13</sup>374 F.2d 739 (7th Cir. 1967). See also *Viles v. Sharp*, 248 F. Supp. 271 (W.D. Mo. 1965). In fact, if the action has been remanded by the federal court pursuant to 28 U.S.C. § 1447(c) (1970), disposition of the motion to dismiss is properly for the state court. *Doran v. Elgin Coop. Credit Ass'n*, 95 F. Supp. 455 (D. Neb. 1950). See generally 14 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* §§ 3738-39 (1976).

<sup>14</sup>331 N.E.2d at 476, citing *Riehl v. National Mut. Ins. Co.*, 374 F.2d at 742. *Riehl* involved a removed action but the *Citizens* court could not see why the same rationale would not apply to a case that has been remanded.

<sup>15</sup>IND. ANN. STAT. § 2-1102 (Burns 1967 Repl.) (current version at IND. R. TR. P. 55).

<sup>16</sup>The court cited as authority *Custer v. Mayfield*, 138 Ind. App. 575, 205 N.E.2d 836 (1965) and 10 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2685 (1973) (discussing Federal Rule 55).

<sup>17</sup>The reference here is to IND. CODE §§ 24-1-2-1, -7 (Burns 1974). The court stated that section 24-1-2-1 was "substantially patterned" after section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970). 331 N.E.2d at 478 n.5. Perhaps "influenced" would be more accurate since section 24-1-2-1 is far more specific than the Sherman Act provision which has been labeled a "charter of economic freedom," REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 1 (1955), but characterized as a legislative command for a judicially developed common law of antitrust. P. AREEDA, *ANTITRUST ANALYSIS* ¶104, at 5 (2d ed. 1974). See generally 16 VON KALINOWSKI, *supra* note 3, § 2.01. IND. CODE § 24-1-2-7 (Burns 1972) authorizes treble damage suits by a person injured "in his business or property."

differs from the federal Sherman Antitrust Act,<sup>18</sup> there is sufficient similarity to section 4 of the Clayton Antitrust Act<sup>19</sup> authorizing federal treble damage suits to justify utilizing federal cases to resolve the issue of Citizens' standing. The standing requirement is to insure recovery only by those whose injury has been proximately caused by an antitrust violation.<sup>20</sup>

The defendants claimed the complaint failed to establish standing because Citizens did not allege any "public injury." At one time federal courts often required a showing of a general injury to the competitive process in an antitrust action.<sup>21</sup> However, as the appellate court pointed out, the United States Supreme Court has rejected this requirement.<sup>22</sup> At least in actions alleging per se violations of the Sherman Act, a conclusion that conduct

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<sup>18</sup>15 U.S.C. §§ 1-11 (1970). See authorities cited at note 17 *supra*.

<sup>19</sup>15 U.S.C. § 15 (1970). The court's statement that section 24-1-2-7 is "substantially patterned" after section 4 is accurate. 331 N.E.2d at 478 n.6. This fact was noted in *Sandidge v. Rogers*, 167 F. Supp. 553, 556 (S.D. Ind. 1958).

<sup>20</sup>Some federal courts take the approach that the injury must be a "direct" result of defendant's violation. See, e.g., *Productive Inventions v. Trico Prods. Corp.*, 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). Others take a more liberal approach and allow recovery to a plaintiff in a "target area" which defendants could reasonably foresee would be affected by a conspiracy. See, e.g., *Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 220 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964); *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 362-64 (9th Cir. 1955). Although the Supreme Court has not directly passed on the issue, its pronouncements seem to support the broader approach. See *Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 423 U.S. 820 (1976); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948) (scope of jurisdiction cases). But see *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262-63 (1972) (the general economy of a state is not "business or property"). See generally ABA 1975 DEVELOPMENTS, *supra* note 11, at 257-61; 16L VON KALINOWSKI, *supra* note 3, §§ 101.01-.02; Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964). The *Citizens* court took pains to emphasize that the standing element does not derogate the broad notice pleading rules of Indiana or in the federal courts. 331 N.E.2d at 479 n.8. See note 31 *infra* and accompanying text. A pleading is sufficient if it apprises defendants of facts from which injury accrued and upon which damages may be assessed. *Farm Bureau Ins. Co. v. Clinton*, 149 Ind. App. 36, 269 N.E.2d 780 (1971).

<sup>21</sup>See, e.g., *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 273 F.2d 196, 200 (7th Cir. 1959), *rev'd per curiam*, 364 U.S. 656 (1961); *Ken-near-Weed Corp. v. Humble Oil & Ref. Co.*, 214 F.2d 891 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

<sup>22</sup>The ruling occurred in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), which was not cited in *Citizens*, and was reaffirmed in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961), which was cited.

violates the antitrust laws "is inherently a declaration that it offends the public interest."<sup>23</sup>

A more crucial aspect of the standing issue was whether Citizens sufficiently alleged a causal connection between its injury and the defendants' acts. The court concluded that the complaint was sufficient and rejected defendants' argument that persons holding only an expectancy of entering a business do not have a "business" interest under the antitrust laws. Although there is some authority to support the defendants' contention,<sup>24</sup> the sounder approach adopted by the court of appeals in *Citizens* rejects this myopic view of antitrust and recognizes that the aim of antitrust laws, to promote competition and prevent undue restraints of trade, can be thwarted as much by precluding a new entrant as by destroying an existing business.<sup>25</sup>

Of course, courts must take care to allow only those plaintiffs who, in the words of an early leading case, have the "intention and preparedness to engage in business."<sup>26</sup> One case relied on in *Citizens* to elaborate on this requirement is *Denver Petroleum Corp. v. Shell Oil Co.*,<sup>27</sup> which posited the elements to be considered in determining whether suit can be maintained by a prospective entrepreneur. Among these factors are the background and

<sup>23</sup>P. AREEDA, ANTITRUST ANALYSIS ¶159, at 69 (2d ed. 1974). There is, however, still some debate whether public injury must be alleged in rule of reason cases. Compare *Syracuse Broadcasting Corp. v. Newhouse*, 295 F.2d 269, 277 (2d Cir. 1961) with *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 517 (6th Cir.), cert. denied, 409 U.S. 1001 (1972) and *Donlan v. Carvel*, 209 F. Supp. 829, 831 (D. Md. 1962). Supreme Court dictum does seem to support the position that public injury is not an element in any section 1 case. *In re McConnell*, 370 U.S. 230, 231 (1962). See generally ABA 1975 DEVELOPMENTS, *supra* note 11, at 265-67; 16M VON KALINOWSKI, *supra* note 3, § 105.02[7]. A claim of public injury alone will not support a treble damage action and plaintiff must plead and prove injury to himself. *Sam S. Goldstein Indus., Inc. v. Botany Indus., Inc.*, 301 F. Supp. 728, 734 (S.D. N.Y. 1969).

<sup>24</sup>See *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962); *LaRouche v. United Shoe Mach. Corp.*, 166 F. Supp. 633 (D. Mass. 1958).

<sup>25</sup>See, e.g., *Woods Exploration & Prod. Co. v. Aluminum Corp. of America*, 438 F.2d 1286, 1310 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972); *Denver Petroleum Corp. v. Shell Oil Co.*, 306 F. Supp. 289 (D. Colo. 1969); *Waldron v. British Petroleum Co.*, 231 F. Supp. 72, 81-82 (S.D. N.Y. 1964). See generally ABA 1975 DEVELOPMENTS, *supra* note 11, at 261-62. "Property" as used in section 4 is generally construed to include any interest protected by law and can be broader than "business." *Waldron v. British Petroleum Co.*, 231 F. Supp. at 86-87; see generally 16L VON KALINOWSKI, *supra* note 3, § 101.02.

<sup>26</sup>*American Banana Co. v. United Fruit Co.*, 166 F. 261, 264 (2d Cir. 1908), *aff'd on other grounds*, 213 U.S. 347 (1909).

<sup>27</sup>306 F. Supp. 289, 307-08 (D. Colo. 1969). See also *Waldron v. British Petroleum Co.*, 231 F. Supp. at 81-82; see generally 16L VON KALINOWSKI, *supra* note 3, § 101.02.

experience of the persons involved, their successes or failures in related businesses, their financial capabilities and resources, and the affirmative actions taken towards entry into the new market.

Citizens easily sustained the "burden" imposed by *Denver Petroleum* because of its banking experience, the Comptroller's preliminary approval of the application, and the prior acquisition of a building in Marion. Although the appellate court cautioned that Citizens might not be able to prove its intent and preparedness to enter the banking business in Marion,<sup>28</sup> there is little doubt how the court viewed the situation. The court probably was influenced by the fact that Citizens did enter the Marion market once the challenges ended.

The appellate court next considered the argument that the complaint was insufficient because it emphasized the defendants' efforts to bar the Comptroller's authorization. There is no question that the complaint was mainly aimed at those particular actions; but Citizens advisedly, or perhaps fortuitously, had included its catchall allegation. Thus, even if the attack on the defendants' attempts to block governmental approval should fail, Citizens might still recover under other grounds; and it is conventional wisdom that a motion to dismiss is improper under Trial Rule 12(B) (6) unless it appears to a certainty that the plaintiff is not entitled to relief under any set of facts.<sup>29</sup> The court emphasized that a complaint need not state all elements of a cause of action and that other procedures are available to properly advise a defendant of the gravamen of a complaint, such as a motion for more definite statement under Trial Rule 12(E) or discovery procedures under Trial Rule 26.

The trial court had apparently followed federal antitrust doctrine of an earlier time requiring greater pleading specificity in antitrust cases than in other federal actions.<sup>30</sup> However, as the *Citizens* court rightly noted, this view no longer prevails. It is now well established that antitrust cases are not an exception to the liberal federal pleading rules,<sup>31</sup> and there is no reason why the

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<sup>28</sup>331 N.E.2d at 480. The court also issued the customary caveat that it was not indicating views on other matters by reversing the judgment. *Id.* at 476.

<sup>29</sup>State v. Rankin, 260 Ind. 228, 230, 294 N.E.2d 604, 606 (1973). See also Sacks v. American Fletcher Nat'l Bank & Trust Co., 258 Ind. 189, 279 N.E.2d 807 (1972); Farm Bureau Ins. Co. v. Clinton, 149 Ind. App. 36, 269 N.E.2d 780 (1971); 1 W. HARVEY, INDIANA PRACTICE 601 (1969).

<sup>30</sup>See, e.g., United Grocers' Co. v. Sau-Sea Foods, Inc., 150 F. Supp. 267, 269 (S.D. N.Y. 1957); Baim & Blank, Inc. v. Warren-Connelly Co., 19 F.R.D. 108, 109 (S.D. N.Y. 1956).

<sup>31</sup>See Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957), relied on in *Citizens*. See also Dailey v. Quality School Plan, Inc., 380 F.2d 484, 486 (5th

same approach should not apply under the Indiana Act. Since the catchall allegation paragraph 6 could cover circumstances justifying relief, the trial court's draconian step of dismissing the complaint was inappropriate.

Defendants also claimed the suit was barred by the statute of limitations. The trial court had agreed, applying the two year statute "for a forfeiture of penalty given by statute."<sup>32</sup> The appellate court did not decide whether that statute was the appropriate one but concluded dismissal was improper because the face of the complaint did not clearly show that the action was barred by that statute.<sup>33</sup> Again paragraph 6 saved Citizens. If the only overt acts were defendants' administrative and judicial efforts, the statute might have started to run in June 1968. The court, applying the rule that the statute does not commence to run until the completion of the last overt act in furtherance of the conspiracy,<sup>34</sup> reasoned that paragraph 6 permitted a showing of subsequent acts that would toll the statute. In fact, from the complaint's face the statute might not have started running until March 1970, when the Marion office was opened. The court recognized that the last overt act might have occurred earlier and conceivably the suit was time barred, but stated that this possibility did not justify granting a motion to dismiss. However, a motion for summary judgment might be appropriate at a later time.

The court then considered the key issue raised by Citizens' appeal, the contention that defendants' actions were protected under the *Noerr-Pennington-Trucking Unlimited*<sup>35</sup> doctrine con-

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Cir. 1967). The Supreme Court has cautioned against summary procedures in antitrust litigation. *Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962). See generally 16J, M VON KALINOWSKI, *supra* note 3, §§ 81.06[1], 105.07[2].

<sup>32</sup>IND. CODE § 34-1-2-2 (Burns 1973). The court in *Sandidge v. Rogers*, 167 F. Supp. 553, 555-56 (S.D. Ind. 1958), applied a predecessor statute to an antitrust complaint arising before the current four year Clayton Act statute of limitations, 15 U.S.C. § 15b (1970), became effective. The statute of limitation of the forum controlled prior to the adoption of section 4B of the Act. *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906); *Schiffman Bros. v. Texas Co.*, 196 F.2d 695 (7th Cir. 1952).

<sup>33</sup>331 N.E.2d at 483, citing *American States Ins. Co. v. Williams*, 151 Ind. App. 99, 278 N.E.2d 295 (1972).

<sup>34</sup>The court adopted the federal court approach here. See *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 418 F.2d 21 (7th Cir. 1969), *rev'd on other grounds*, 401 U.S. 321 (1971); *Northern Ky. Tel. Co. v. Southern Bell Tel. & Tel. Co.*, 73 F.2d 333 (6th Cir. 1934). See generally 16J VON KALINOWSKI, *supra* note 3, § 81.04[2].

<sup>35</sup>*California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *UMW v. Pennington*, 381 U.S. 657 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). The doctrine

ferring antitrust immunity on concerted actions aimed at influencing governmental decisions even if reprehensible in nature and done with an anticompetitive intent. The rationale of the doctrine, as propounded in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*<sup>36</sup> is that Congress did not intend to apply the antitrust laws to concerted efforts seeking legislative action because of constitutional considerations.<sup>37</sup> Although *Noerr* was a statutory construction case, the Supreme Court raised the doctrine to a constitutional level in *California Motor Transport Co. v. Trucking Unlimited*,<sup>38</sup> justifying it on first amendment grounds<sup>39</sup> and applying it to efforts to influence governmental actions through litigation as well as lobbying. *UMW v. Pennington*<sup>40</sup> furnished the other element appropriate to *Citizens* by immunizing joint actions undertaken to influence administrative decisions.

Even though *Noerr-Pennington-Trucking Unlimited* bars antitrust attacks on joint actions akin to defendants' efforts, the appellate court was correct in reversing the judgment since paragraph 6 was broad enough to cover "nongovernmental" aspects of the putative conspiracy. These aspects could justify antitrust recovery even if allegations of the attempt to influence the Comptroller and the subsequent litigation were disregarded.<sup>41</sup>

Furthermore, even if the complaint were limited to the efforts to bar governmental approval, *Citizens* might fall within the "sham exception" to the doctrine recognized in *Noerr* and developed in *Trucking Unlimited*. This exception to the immunity applies where a defendant's aim is not to influence government action but is merely a disguised anticompetitive effort.<sup>42</sup> The

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has generated considerable academic comment. See authorities cited in Galanti, *Seventh Circuit Review—Antitrust*, 52 CHI.-KENT L. REV. 203, 208 n.15 (1975) [hereinafter cited as Galanti, *Antitrust*]. See generally ABA 1975 DEVELOPMENTS, *supra* note 11, at 410-11; 16F VON KALINOWSKI, *supra* note 3, §§ 45.08, 46.04.

<sup>36</sup>365 U.S. 127 (1961).

<sup>37</sup>*Id.* at 132 n.6, 139. See Galanti, *Antitrust*, *supra* note 35, at 209.

<sup>38</sup>404 U.S. 508 (1972). See generally 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 1023-24 (1973) [hereinafter cited as HANDLER].

<sup>39</sup>See 404 U.S. at 510-11.

<sup>40</sup>381 U.S. 657 (1965).

<sup>41</sup>An antitrust victim can recover for anticompetitive acts that do not involve governmental action even if some aspects of a conspiracy are protected. See *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972).

<sup>42</sup>331 N.E.2d at 484 n.10. The "sham exception" was raised in *Noerr* because of a fear that the Sherman Act would be eviscerated whenever some state activity is involved. See Galanti, *Antitrust*, *supra* note 35, at 210; see generally 16F VON KALINOWSKI, *supra* note 3, § 46.04[3]. There has been some debate on the question of whether *Trucking Unlimited* has narrowed the *Noerr* holding. Compare 2 HANDLER, *supra* note 37, at 1017-30 with ABA 1975 DEVELOPMENTS, *supra* note 11, at 410 and Oppenheim, *Antitrust Immunity for*



complaint in *Citizens* does not seem to fall within the sham exception, but it is not inconceivable that it might; and the court was therefore justified in holding the motion to dismiss improper. Of course, if the only anticompetitive acts were those aimed at government action, the suit would be inappropriate and a motion for summary judgment would be in order.

The final aspect of *Citizens* was whether the action was barred by the res judicata doctrine or as a collateral attack on the earlier federal decisions.<sup>43</sup> Once again the court turned to paragraph 6 and noted that *Citizens* could possibly prove facts subsequent to the federal litigation that would not be barred by either doctrine. The court also wisely acknowledged that the various defenses might preclude some of the issues even if they did not preclude the suit. However, the plethora of grounds raised at this pleading stage failed to justify a motion to dismiss. *Citizens* was entitled to present its case although it might not in fact make a case.<sup>44</sup>

### B. Securities Law Fraud

In *Green v. Karol*<sup>45</sup> the Third District Court of Appeals reached the right result but, in one respect, on erroneous grounds. The suit alleged a violation of the Indiana Securities Act<sup>46</sup> (Blue Sky Act); the federal Securities Act of 1933<sup>47</sup> (1933 Act); the federal Securities Exchange Act of 1934<sup>48</sup> (1934 Act) and imple-

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*Joint Efforts to Influence Adjudications Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlimited*, 29 WASH. & LEE L. REV. 209, 217-24 (1972). See also *Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975), discussed in *Galanti, Antitrust*, *supra* note 35, at 205-16; *Bob Layne Contractor, Inc. v. Bartel*, 504 F.2d 1293 (7th Cir. 1974), discussed in *Galanti, Antitrust*, *supra*, at 204 n.1.

<sup>43</sup>*Marion Nat'l Bank v. Van Buren Bank*, 418 F.2d 121 (7th Cir. 1969); *Marion Nat'l Bank v. Saxon*, 261 F. Supp. 373 (N.D. Ind. 1966).

<sup>44</sup>The court could not resist the opportunity to take a probably well-deserved dig at the parties for not resolving the preliminary issues *before* the suit reached the appellate level. See 331 N.E.2d at 485.

<sup>45</sup>344 N.E.2d 106 (Ind. Ct. App. 1976) (Staton, J.), also discussed in *Harvey, Civil Procedure*, *infra* at 112.

<sup>46</sup>IND. CODE §§ 23-2-1-1 to -25 (Burns Supp. 1976). For a general discussion of Blue Sky Acts see 14 FLETCHER, *supra* note 1, §§ 6738-44; HENN, *supra* note 1, §§ 305-08; LATTIN, *supra* note 1, § 44. State securities legislation is extensively and critically treated in L. LOSS & E. COWETT, *BLUE SKY LAWS* (1958). See also Pamas, *Securities Issuance and Regulation: The New Indiana Securities Law*, 38 IND L.J. 38 (1962).

<sup>47</sup>15 U.S.C. §§ 77a-77aa (1970). The commentary on federal regulation of securities is legion. The classic reference is L. LOSS, *SECURITIES REGULATION* (2d ed. 1961 & Supp. 1969), but other selected references can be found in D. RATNER, *SECURITIES REGULATION* 27 (1975).

<sup>48</sup>15 U.S.C. §§ 78a-78hh (1970).

menting rule 10b-5;<sup>49</sup> money had and received; and common law fraud.<sup>50</sup> It arose from Green's efforts to recover \$30,000 paid in 1967 for securities of a Costa Rican sugar refinery. The securities had not been registered with the Indiana Securities Commissioner under the Blue Sky Act<sup>51</sup> or with the Securities and Exchange Commission under the 1933 Act.<sup>52</sup>

In an earlier case<sup>53</sup> involving Dr. Karol, the Third District had ruled that the sale of these securities to another doctor in Fort Wayne was not within either the small offering exemption<sup>54</sup> or the isolated non-issuer transaction exemption<sup>55</sup> of the Blue Sky Act. However, unlike the earlier plaintiff, who acted promptly when the fortunes of the company soured in 1969, Dr. Green did not sue until May 1972. The trial court initially defaulted Karol for failing to plead; however the entry was set aside and the directed verdict for Karol entered. Thus, the issues before the appellate court were: (1) whether the trial court abused its discretion in setting aside the default entry; and (2) whether it erred in directing a verdict on the state and federal securities issues and the count for money had and received.

On the first issue, the court concluded the trial court did not abuse its discretion in setting aside the default entry under Trial Rule 55(A).<sup>56</sup> Since no default judgment had been entered, the requirement of Trial Rule 55(C) that default judgments can only

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<sup>49</sup>17 C.F.R. § 240.10b-5 (1975).

<sup>50</sup>The common law fraud count was submitted to the jury, and Green did not appeal an adverse verdict. 344 N.E. 2d at 109 n.3.

<sup>51</sup>IND. CODE § 23-2-1-3 (Burns Supp. 1976) prohibits the sale of securities unless registered in accordance with *id.* §§ 23-2-1-4 to -7 or the security or transaction is exempt under *id.* § 23-2-1-2. See generally Pasmias, *Securities Issuance and Regulation: The New Indiana Securities Law*, *supra* note 43.

<sup>52</sup>Section 5 of the 1933 Act, 15 U.S.C. § 77e (1970), prohibits the sale, offer to sell, or offer to buy unregistered securities unless the securities are exempt under section 3, *id.* § 77c, or the transactions are exempt under section 4, *id.* § 77d. See 11 H. SOWARDS, *SECURITIES REGULATION* § 2.01 (1975) [hereinafter cited as SOWARDS].

<sup>53</sup>*Hippensteel v. Karol*, 304 N.E.2d 796 (Ind. Ct. App. 1973), discussed in Galanti, *Business Associations, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 24, 29-35 (1974) [hereinafter cited as Galanti, *1974 Survey*].

<sup>54</sup>IND. CODE § 23-2-1-2(b) (10) (Burns Supp. 1976). For a general discussion of Blue Sky Act exemptions see Note, *Securities Registration Requirements in Indiana*, 3 IND. LEGAL F. 270, 285-94 (1969). See generally 14 FLETCHER, *supra* note 1, § 6754; Doxsee, *Securities Problems in Indiana*, 17 RES GESTAE 6 (Sept. 1973).

<sup>55</sup>IND. CODE § 23-2-1-1(b) (1) (Burns Supp. 1976).

<sup>56</sup>The court cited as authority *Citizens Nat'l Bank v. First Nat'l Bank*, 331 N.E.2d 471 (Ind. Ct. App. 1975), discussed at text accompanying notes 13-16 *supra*.



be set aside in accordance with the strict requirements of Trial Rule 60(B) did not apply.<sup>57</sup> The *Green* court did recognize the role of default judgments in enforcing rules of procedure, but tempered its application with the judicial preference for deciding a case on its merits. Although the defaulted party must establish that a default judgment would result in an injustice, any doubts in the propriety of entering the default judgment should be resolved against the moving party.<sup>58</sup> In affirming the trial court, the appellate court emphasized the amount of money and the importance of the issues involved. The court also noted that the delay was short; did not prejudice Green; was inadvertent, even if it did not satisfy the "excusable neglect" standard of Trial Rule 60(B);<sup>59</sup> and, in particular, that Karol had an apparently meritorious defense.

On the merits, the appellate court started from the premise that Trial Rule 50 permits a directed verdict only if there is no evidence, with all fair and rational inferences, to support a verdict for the nonmoving party.<sup>60</sup> In essence, there must be either no evidence on a crucial factual issue necessary to support a verdict or a clear defense supportable by the evidence. Karol prevailed on both points. The court concluded that the securities law violations were time barred and there was no evidence to support liability for money had and received.

The *Green* result seems correct but the discussion of the statute of limitations for the possible 1934 Act violation, although correct, really was irrelevant. What appears to have happened is that neither the courts nor the parties realized that Congress withheld from state courts jurisdiction to entertain 1934 Act claims. Section 27 of the Act<sup>61</sup> grants federal district courts the *exclusive jurisdiction* to enforce its provisions.<sup>62</sup> There is considerable au-

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<sup>57</sup>*Green*, a Third District Court of Appeals decision, appears to conflict with the Second District Court of Appeals decisions in *Henline, Inc. v. Martin*, 348 N.E.2d 416 (Ind. Ct. App. 1976), and *Glennar Mercury-Lincoln, Inc. v. Riley*, 338 N.E.2d 670 (Ind. Ct. App. 1975) (discussed in Harvey, *Civil Procedure*, *infra* at 91), which seem to require compliance with Trial Rule 60(B) in attacking a default entry.

<sup>58</sup>See *Clark County State Bank v. Bennett*, 336 N.E.2d 663 (Ind. Ct. App. 1975); *Duncan v. Binford*, 151 Ind. App. 199, 278 N.E.2d 591 (1972).

<sup>59</sup>See *Henline, Inc. v. Martin*, 348 N.E.2d 416 (Ind. Ct. App. 1976); *Continental Assurance Co. v. Sickels*, 145 Ind. App. 671, 252 N.E.2d 439 (1969).

<sup>60</sup>See *Miller v. Griesel*, 308 N.E.2d 701, 707 (Ind. 1974); *Jordanich v. Gerstbauer*, 153 Ind. App. 416, 287 N.E.2d 784 (1972).

<sup>61</sup>15 U.S.C. § 78aa (1970). See generally 11A E. GADSBY, *BUSINESS ORGANIZATIONS, Securities Regulation* § 5.03[3] (1976). [hereinafter cited as GADSBY].

<sup>62</sup>Even though state courts lack 1934 Act jurisdiction, there is no pre-emption problem. Section 28(a) of the 1934 Act, 15 U.S.C. § 78bb(a) (1970),

thority construing the impact of section 27 on state courts. One leading case is *American Distilling Co. v. Brown*,<sup>63</sup> in which the New York Court of Appeals affirmed dismissal of a complaint filed under section 16(b) of the 1934 Act<sup>64</sup> in a stronger case for state jurisdiction than *Green*. Unlike section 10(b) and rule 10b-5, where the civil cause of action has been implied,<sup>65</sup> section 16(b) specifically authorizes a corporation or a shareholder in a derivative suit to recover "short swing" profits by a statutory insider in "any court of competent jurisdiction."<sup>66</sup> Notwithstanding the

provides that rights and remedies under the Act are cumulative, although recovery is limited to actual damages, and that the jurisdiction of state securities commissions is unaffected except where it conflicts with the Act or implementing rules. See *People v. Birrell*, 46 Misc. 2d 1053, 261 N.Y.S.2d 609 (Sup. Ct. 1965).

In *Herron Northwest, Inc. v. Danskin*, 1 Wash. App. 818, 464 P.2d 435 (1970), the trial court had exercised jurisdiction over a claim involving stock purchase margins allegedly violating Regulation T, promulgated under section 7(a) of the 1934 Act, 15 U.S.C. § 78g(a) (1970). On appeal the court rejected the possible Regulation T claim but remanded the case to see whether plaintiff had stated a claim under an alternatively pleaded state law count. Similarly, in *Pierce v. Richard Ellis & Co.*, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,579 (N.Y. Civil Ct. 1970), the court held that the 1934 Act barred a state court rule 10b-5 action but that the alleged stock "churning" could constitute common law fraud as well. Finally, in *Goodbody & Co. v. Penjaska*, 8 Mich. App. 64, 153 N.W.2d 665 (1967), the court allowed an action to recover on a margin account because it was a common law action for debt and not an action under Regulation T.

<sup>63</sup>295 N.Y. 36, 64 N.E.2d 347 (1945), *aff'g* 269 App. Div. 763, 54 N.Y.S.2d 855 (App. Div.), *aff'g* 184 Misc. 431, 51 N.Y.S.2d 614 (Sup. Ct. 1944).

<sup>64</sup>15 U.S.C. § 78p(b) (1970). See generally 11A GADSBY, *supra* note 61, § 8.02; Woodside, *Resumé of the Report of the Special Study of Securities Markets and the Commission's Legislative Proposals*, 19 BUS. LAW. 463, 476 (1964).

<sup>65</sup>The implied cause of action initially was recognized in *Kardon v. National Gypsum Co.*, 73 F. Supp. 798, 802 (E.D. Pa. 1947), discussed in Note, *Implied Liability Under the Securities Exchange Act*, 61 HARV. L. REV. 858 (1948). The Supreme Court has confirmed the existence of the cause of action. *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 150-54 (1972); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 n.9 (1971). However, the majority of the Court today, with a demonstrated hostility toward an expansive reading of rule 10b-5, conceivably would rule otherwise if the existence of an implied cause of action were not so well established. See *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). See generally BUSINESS WEEK, Sept. 1, 1976, at 57. It is even possible to wonder if decisions such as *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964), and *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), recognizing in general that private enforcement of SEC rules may supplement SEC action, would be decided the same way today. Cf. *TSC Indus., Inc. v. Northway, Inc.*, 96 S. Ct. 2126 (1976). See generally 11A GADSBY, *supra* note 61, § 5.03.

<sup>66</sup>15 U.S.C. § 78p(b) (1970). The section 16(b) action is a *sui generis* proceeding aimed at discouraging insider trading by allowing the issuer to

superficial soundness of the argument that the specific language of section 16(b) gives a court with jurisdiction over the defendant jurisdiction over the cause of action, the New York court concluded section 27 controlled.<sup>67</sup> The rationale for the restrictive rule, according to the court in *Investment Associates, Inc. v. Standard Power & Light Corp.*,<sup>68</sup> was a Congressional intent to have consistent and efficient enforcement of the Act. State court jurisdiction is so inconsistent with the Congressional intent that a 1934 Act violation cannot be raised as a defense in a state court suit.<sup>69</sup>

The *Green* court, however, was correct in considering whether there had been a 1933 Act violation because section 22(a)<sup>70</sup> grants state and territorial courts concurrent jurisdiction to enforce any liability or duty.<sup>71</sup> The policies of the two Acts differ so much that the 1933 Act specifically bars removing cases from state to federal courts.<sup>72</sup> Apparently the 1933 Act jurisdiction was not thoroughly researched by the parties in *Green* because research might have disclosed *Schnall v. Loeb, Rhoades & Co.*,<sup>73</sup> a New York case rejecting jurisdiction of an action brought pursuant to the 1934 Act but upholding 1933 Act jurisdiction. Although *Green's* complaint was not specific, at least as restated by the appellate court, any 1933 Act relief could only be based on sections 12(1),

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recover profits made by the insiders specified in section 16(a), 15 U.S.C. § 77p(a) (1970), in almost all situations even where the insider did not in fact make a profit in an ordinary financial sense. See *Smolowe v. Delendo Corp.*, 136 F.2d 231 (2d Cir.), cert. denied, 320 U.S. 751 (1943). See generally 11A GADSBY, *supra* note 61, § 8.02[1]. The Supreme Court's current hostility to a broad reading of the 1934 Act has carried over into the section 16(b) area. See *Foremost-McKesson, Inc. v. Provident Securities Co.*, 423 U.S. 232 (1976).

<sup>67</sup>295 N.Y. at 36, 64 N.E.2d at 348-49.

<sup>68</sup>29 Del. Ch. 225, 48 A.2d 501 (1946). See also *Standard Power & Light Corp. v. Investment Assocs.*, 29 Del. Ch. 593, 51 A.2d 572 (1947).

<sup>69</sup>*Investment Assocs. v. Standard Power & Light Corp.*, 29 Del. Ch. 225, 48 A.2d 501 (1946). However, in *McGregor v. Consolidated Airborne Sys., Inc.*, [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,410 (N.Y. Co. Sup. Ct. 1964), a rule 10b-5 violation was allowed as a counterclaim but the court did not discuss section 27.

<sup>70</sup>15 U.S.C. § 77v(a) (1970).

<sup>71</sup>See *Wilko v. Swan*, 346 U.S. 427 (1953); *American General Life Ins. Co. v. Miller*, [1964-66 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,448 (Baltimore, Md. Super. Ct. 1964); *Schnall v. Loeb, Rhoades & Co.*, [1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,104 (N.Y. Co. Sup. Ct. 1971); *Negin v. Cico Oil & Gas Co.*, 46 Misc. 2d 367, 259 N.Y.S.2d 434 (N.Y. Co. Sup. Ct. 1965). See generally 11A GADSBY, *supra* note 61, § 10.07[1][b].

<sup>72</sup>15 U.S.C. § 77v(a) (1970). See *Wilko v. Swan*, 346 U.S. 427, 431 (1953).

<sup>73</sup>[1970-71 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,104 (N.Y. Co. Sup. Ct. 1971).

12(2) and 17.<sup>74</sup> There was therefore no problem with an Indiana court exercising jurisdiction because all the transactions occurred in this state.<sup>75</sup>

Although the Indiana Court had jurisdiction, it is clear the statute of limitations of section 13<sup>76</sup> determined whether the section 12 actions were time barred. For a violation of section 12(2), involving untrue statements or omissions of material facts, suit must be brought within one year of discovery of the violation, or when it should have been discovered by the exercise of reasonable diligence, but no later than three years after the sale. Section 13 is more narrowly drawn than section 12(1), and suit must be brought within one year of the violation and three years from the bona fide offering of the security.<sup>77</sup>

The limitation provisions are exclusive, and the three year provision does not extend the one year provision, and vice versa.<sup>78</sup> In other words, a section 12(2) suit involving an untrue statement of a material fact brought the day after the violation is discovered, but over three years after the sale, is barred, as is a suit brought a year and a day from discovery of the violation but well within the three year period. The requirement that section 12(1) rescission suits, involving sales of securities in violation of section 5 of the

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<sup>74</sup>15 U.S.C. §§ 771(1)-(2), 77q (1970). Since the securities had not been registered, liability on account of a false registration statement under section 11, *id.* § 77k (1970), was foreclosed. See 344 N.E.2d at 112 n.9; see generally 11 SOWARDS, *supra* note 52, § 9.02.

<sup>75</sup>It is settled that the personal jurisdiction requirements of state law must be met even for the federal cause of action. *Negin v. Cico Oil & Gas Co.*, 259 N.Y.S.2d 434, 436 (N.Y. Co. Sup. Ct. 1965). The fact that a federal court in a state might have venue under section 22(a) does not automatically give a state court jurisdiction. *Id.* The restriction cuts both ways, and the broad federal process provisions cannot be used as a sham to obtain jurisdiction to enforce a pendent claim. *Ratner v. Scientific Resources Corp.*, 53 F.R.D. 325 (S.D. Fla. 1971), *appeal dismissed*, 462 F.2d 616 (5th Cir. 1972). See generally *Mills, Pendent Jurisdiction and Extraterritorial Service Under the Federal Securities Laws*, 70 COLUM. L. REV. 423 (1970).

<sup>76</sup>15 U.S.C. § 77m (1970); *cf.* *Herget v. Central Nat'l Bank & Trust Co.*, 324 U.S. 4 (1945). For a general discussion of the statute of limitations for 1933 Act violations, see 11 SOWARDS, *supra* note 52, § 9.05.

<sup>77</sup>The statutory period for a section 11 action on a false registration statement is one year from the discovery of the violation, or when it should have been discovered, with an outside limit of three years after the bona fide offering of the security to the public. Thus section 11 is treated in part like section 12(1) and in part like section 12(2).

<sup>78</sup>See, e.g., *Gallik v. Franklin*, 145 F. Supp. 315, 316 (S.D. N.Y. 1956); *Osborne v. Mallory*, 86 F. Supp. 869, 874 (S.D. N.Y. 1949); *Shonts v. Hirliman*, 28 F. Supp. 478, 486 (S.D. Cal. 1939). The same rule applies to state Blue Sky statutes patterned on section 13. See *Woodhull v. Minot Clinic*, 259 F.2d 676 (8th Cir. 1958). See generally 11 SOWARDS, *supra* note 11, § 9.05 at 9-28.2.

1933 Act,<sup>79</sup> must be brought within one year of the violation and three years of the offering seems somewhat anomalous. However, the prospectus delivery requirements of section 5 are continuous, and a violation is possible even after a proper initial public offering.<sup>80</sup> The importance of section 13 cannot be overemphasized since compliance is an essential ingredient of a suit.<sup>81</sup> Failing to plead facts conforming to section 13 is fatal to a 1933 Act claim<sup>82</sup> and a plaintiff must allege both the date the fraud was discovered and that it could not have been discovered sooner through the exercise of reasonable diligence.<sup>83</sup>

Green's suit was not filed until May 1972, and it was clear to the court that Green's possible section 12(1) violation was barred in February 1968, one year after the transaction; and the possible section 12(2) violation was barred in February 1970, three years after the sale, regardless of when Green discovered or could have discovered any misstatements. Although the issue was raised in the context of the court's discussion of the 1934 Act, the appellate court was satisfied that Green was aware of Karol's misrepresentations as early as January 1968, and had indications of nondisclosure in the summer of 1968 and June 1971.

The appellate court also considered possible claims under the antifraud provisions, section 17 of the 1933 Act<sup>84</sup> and section

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<sup>79</sup>15 U.S.C. § 77e (1970).

<sup>80</sup>*See, e.g., SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082 (2d Cir. 1972). *See generally* 11 SOWARDS, *supra* note 52, §§ 7.06, 9.05.

<sup>81</sup>*See, e.g., Newburg v. American Dryer Corp.*, 195 F. Supp. 345 (E.D. Pa. 1961). *See generally* 11 SOWARDS, *supra* note 52, § 9.05, at 9-29 to -30.

<sup>82</sup>*Premier Indus., Inc. v. Delaware Valley Fin. Corp.*, 185 F. Supp. 694, 696 (E.D. Pa. 1960).

<sup>83</sup>*Dale v. Rosenfeld*, 229 F.2d 855, 858 (2d Cir. 1956); *Osborne v. Mallory*, 86 F. Supp. 869, 876 (S.D. N.Y. 1949).

<sup>84</sup>The court apparently assumed that a violation of section 17 gives rise to an implied cause of action despite the express civil remedies of the 1933 Act. Although the consensus is that there is a cause of action, *see* 11 SOWARDS, *supra* note 52, § 10.01[i], it is more restricted than the implied action under the 1934 Act. It is available only where fraud and not mere negligence is alleged, *see Fischman v. Raytheon Mfg. Co.*, 188 F.2d 783, 787 n.2 (2d Cir. 1951); *cf. Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), and perhaps only where a plaintiff is a purchaser of securities who could sue under section 12, *see Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 788-91 (8th Cir. 1967); *cf. Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). As Professor Loss points out, 3 L. LOSS, *SECURITIES REGULATION* 1785-86 (2d ed. 1961), too broad a reading of section 17 would undermine the carefully structured civil remedy of section 12(2). Of course, this might be the goal of a plaintiff running afoul of the statute of limitations of section 13. *See Osborne v. Mallory*, 86 F. Supp. 869 (S.D. N.Y. 1949). Unfortunately, the fact that the Supreme Court has not ruled on the existence of an implied cause of action under section 17 was noted by Justice Rehnquist in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. at 733 n.6, and there is contemporane-

10(b) and rule 10b-5 of the 1934 Act, but ultimately concluded that these actions also were time barred. Since these provisions merely imply a cause of action, there is no express statute of limitations applicable to suits under these provisions. In these situations federal courts look to the law of the forum<sup>85</sup> for an appropriate statute. However, this is not always a simple process, since there may be two possible statutes: the general fraud statute or the Blue Sky Act statute. In deciding which is appropriate, the courts choose the statute that best effectuates the remedial purposes of the security laws and closely tracks the express provisions of the 1933 Act.<sup>86</sup>

The court followed the current trend towards utilizing the Blue Sky rather than the fraud statute.<sup>87</sup> Consequently, the court held that the potential section 17<sup>88</sup> action and the putative 1934 Act actions are controlled by the two year period provided in the Blue

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ous evidence that section 17 was limited to injunctive relief or, in appropriate cases, criminal prosecution. *See, e.g.,* Landis, *Liability Section of Securities Act*, 18 AM. ACCOUNTANT 330, 331 (1933). *See also* SEC v. Texas Gulf Sulphur Co., 402 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969).

<sup>85</sup>*See, e.g.,* Holmberg v. Armbrrecht, 327 U.S. 392 (1946). *See generally* 11A GADSBY, *supra* note 61, § 5.03[4][a]; 11 SOWARDS, *supra* note 52, § 9.05[1]. Suits to enforce liability under section 18 of the 1934 Act must be brought within one year of discovery of the facts constituting the cause of action but no later than three years from the date the action occurred, 15 U.S.C. § 78r (1970).

<sup>86</sup>344 N.E.2d at 113, *citing* Parrent v. Midwest Rug Mills, Inc., 455 F.2d 123 (7th Cir. 1972); Vanderboom v. Sexton, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970); Corey v. Bache & Co., 355 F. Supp. 1123 (S.D. W. Va. 1973). For a general discussion of the statutes of limitations issue, see Einhorn & Feldman, *Choosing a Statute of Limitations in Federal Securities Actions*, 25 MERCER L. REV. 497 (1974); Schulman, *Statutes of Limitations in 10b-5 Actions: Complication Added to Confusion*, 13 WAYNE L. REV. 635 (1967).

<sup>87</sup>However, cases using the fraud statute still predominate numerically. *See* Einhorn & Feldman, *supra* note 86, at 500 n.21. The authors note that the Seventh Circuit's holding in *Parrent* now represents the view of federal courts applying Illinois law. *Id.* at 113. The *Green* court either ignored or was unaware of *Morgan v. Koch*, 419 F.2d 993 (7th Cir. 1969), in which the court applied the Indiana fraud statute in a rule 10b-5 action. However, the parties in *Morgan* had agreed that the six year statute applied. *Id.* at 997. In *Corey v. Bache & Co.*, 355 F. Supp. 1123 (S.D. W. Va. 1973), transferred from the Southern District of Indiana pursuant to 28 U.S.C. § 1404(a) (1970), the court also applied the Indiana Blue Sky provision, *citing Parrent*.

<sup>88</sup>*Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972), and *Corey v. Bache & Co.*, 355 F. Supp. 1123 (S.D. W. Va. 1973), involved section 17 and rule 10b-5 claims. *Vanderboom v. Sexton*, 422 F.2d 1233 (8th Cir.), *cert. denied*, 400 U.S. 852 (1970) was a rule 10b-5 action. There are cases applying the general fraud statute of limitations to section 17 suits. *See, e.g.,* Osborne v. Mallory, 86 F. Supp. 869 (S.D. N.Y. 1949).

Sky Act in effect at the time of the transactions.<sup>89</sup> The six year general fraud statute of limitations<sup>90</sup> was rejected because the Blue Sky Act more closely tracks the federal law, even though the civil liability provisions of the Indiana Act and the two federal acts are not identical.<sup>91</sup>

The court in *Green* applied the doctrine that the statute commences for the federal actions when the fraud is discovered or should have been discovered through reasonable diligence.<sup>92</sup> As the court in *Parrent v. Midwest Rug Mills, Inc.*,<sup>93</sup> relied on in *Green*, stated, "[T]he statute does not begin to run until the fraud is discovered where a plaintiff injured by fraud 'remains in ignorance of it *without any fault or want of diligence or care on his part . . .*'"<sup>94</sup> Consequently, it is possible that a 1934 Act claim in a federal court may be barred before a Blue Sky violation controlled by the same statute of limitations, because the violation could have

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<sup>89</sup>That provision, Ch. 333, § 507(e), 1961 Ind. Acts 1024, required suits to be brought no later than two years after the contract of sale. In 1969, this was amended to two years after discovery of the violation, IND. CODE § 23-2-1-19(e) (Burns 1972), and in 1975 the period was increased to three years. IND. CODE § 23-2-1-19(e) (Burns Supp. 1976). See Galanti, *Business Associations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 33, 63 (1975) [hereinafter cited as Galanti, *1975 Survey*]. The *Green* court recognized that the legislature can alter the time within which suit must be brought, *Meyers v. Hoover*, 300 N.E.2d 110 (Ind. Ct. App. 1973), but applied the rule that a barred action cannot be revived by a lengthened limitations period. *Oberg v. D. O. McComb & Sons*, 127 Ind. App. 278, 141 N.E.2d 135 (1957).

One point mentioned in *Green* in adopting the Blue Sky statute was the "trend" toward applying rule 10b-5 to negligent as well as intentional misrepresentations. Of course, the "trend" was blunted by the Supreme Court's decision in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), requiring scienter in a rule 10b-5 action. The scienter requirement has since been imposed in an SEC action seeking injunctive relief under rule 10b-5. *SEC v. Bausch & Lomb, Inc.*, 45 U.S.L.W. 2156 (S.D. N.Y. Sept. 16, 1976). Certainly, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), demonstrates hostility to an expansive reading of the rule. See discussion and authorities cited in note 65 *supra*.

<sup>90</sup>IND. CODE § 34-1-2-1 (Burns 1973).

<sup>91</sup>For a discussion of the rationales for selecting the appropriate statute, see Einhorn & Feldman, *supra* note 86; see also 11A GADSBY, *supra* note 61, § 5.03[4][a].

<sup>92</sup>See, e.g., *Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123, 128 (7th Cir. 1972); *Vanderboom v. Sexton*, 422 F.2d 1233, 1240 (8th Cir. 1970); see generally 11A GADSBY, *supra* note 61, § 5.03[4][a]. This policy applies to both actions in law and equity—*Parrent v. Midwest Rug Mills, Inc.*, 455 F.2d 123 (7th Cir. 1972).

<sup>93</sup>455 F.2d 123 (7th Cir. 1972).

<sup>94</sup>*Id.* at 128, quoting from *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874) (emphasis added).



been discovered sooner by the exercise of reasonable diligence.<sup>95</sup>

As previously discussed, the appellate court concluded Green had had indications of Karol's misdeeds as early as January 1968.<sup>96</sup> Therefore, the possible actions under sections 17 and 10(b) and rule 10b-5 were barred in 1970, or in 1971 if the three year period were to be applied. The possible Blue Sky action was clearly barred, because the then-effective statute started the period running at the formation of the contract of sale rather than from discovery of the fraud as presently provided.<sup>97</sup>

Green also contended that Karol had waived the limitations defenses. Karol's counsel had made some comments that there were no limitations defenses to the sections 17 and 10(b) actions, but the court found that the statement was not an unequivocal waiver. At most, the attorney had incorrectly stated the law. The court also concluded that the trial court had not erred in directing the verdict on the common law count of money had and received since Green had paid the funds to the corporation, rather than to Karol, and there was no evidence that Karol had requested Green to pay the corporation for Karol's benefit.<sup>98</sup>

### C. Securities Act Exemptions and Defenses

The Second District Court of Appeals took an interesting approach in denying relief in *Theye v. Bates*,<sup>99</sup> a Blue Sky Act suit brought in Marion Superior Court to recover the purchase price<sup>100</sup> of stock of Development Corporation of America [DCA]. The stock had not been registered in compliance with the Act.<sup>101</sup> The appellate court affirmed a judgment for defendants.

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<sup>95</sup>This assumes the statute of limitations for a possible Blue Sky claim commences with actual discovery of the violation rather than following the federal rule. Of course, laches might be a possibility. See Galanti, 1975 *Survey*, *supra* note 89, at 63.

<sup>96</sup>See text accompanying notes 83-84 *supra*.

<sup>97</sup>Compare Ch. 333, § 507(e), 1961 Ind. Acts 1024 with IND. CODE § 23-2-1-19(e) (Burns Supp. 1976).

<sup>98</sup>See Conklin v. Smith, 3 Ind. 286 (1852).

<sup>99</sup>337 N.E.2d 837 (Ind. Ct. App. 1975) (Buchanan, J.), also discussed in Harvey, *Civil Procedure*, *infra* at 98.

<sup>100</sup>IND. CODE § 23-2-1-19(a)(1) (Burns 1972), then in effect, authorized purchasers of unregistered securities to recover the consideration paid. Subsection (b) imposed joint and several liability on officers and directors of sellers of unregistered securities unless a due diligence defense could be established. The current language of section 23-2-1-19(a) allows recovery by purchasers if they "did not knowingly participate in the violation or who did not have, at the time of the transaction knowledge of the violation . . ." Consequently the result reached in *Theye* might well be mandated by the current civil penalty provision.

<sup>101</sup>See note 51 *supra*.



DCA was formed to assist in franchising a spaghetti restaurant based in Fort Wayne. Individual defendant, William Bates, was a promoter of DCA and chairman and chief executive officer of a number of satellite corporations designed to implement DCA's franchise development program. Before meeting with Theye and Elzey, as prospective investors, Bates had obtained financial information from the owners of the restaurant substantially overstating the restaurant's monthly gross income. He passed the information on, at least to Theye. Although other individuals and two corporations agreed to acquire DCA shares in a subscription agreement, only plaintiffs Theye and Elzey paid cash for their shares.<sup>102</sup> Plaintiffs became directors and officers of DCA when it was formed. The company eventually failed, and plaintiffs sued.

The appellate court determined there were two issues presented on appeal: (1) whether the failure to register the securities was a violation of section 23-2-1-3 of the Blue Sky Act; and (2) whether Bates' financial representations were fraudulent within the meaning of sections 23-2-1-1(d) and 12 of the Act. As to the first issue, defendants contended the securities were exempt from registration under the then-effective non-public offering exemption of section 23-2-1-2(b)(10).<sup>103</sup> As to the second, they simply contended the trial court correctly ruled there was no fraud.

The appellate court held the securities were not exempt as a private offering. The sales ostensibly fell within the exemption because the offers were made to no "more than 20 persons in this state." However, DCA did not comply with the statutory conditions

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<sup>102</sup>Bates' consideration for his shares was "promotional services." 337 N.E.2d at 839. The Indiana General Corporation Act, IND. CODE § 23-1-2-6(e) (Burns Supp. 1976), provides that the consideration for shares may be money, property (which would include securities) and services actually rendered. Future services are not proper consideration for shares, but apparently this was not a problem with Bates' "promotional services." See generally 4A CAVITCH, *supra* note 1, § 90.01[3].

<sup>103</sup>The (b)(10) private offering exemption in effect at the time of the transaction exempted offers to sell securities directed at no more than 20 persons in Indiana provided that each buyer "represents in writing to the seller that he is purchasing such securities for investment." The (b)(10) exemption was in issue in *Hippensteel v. Karol*, 304 N.E.2d 796 (Ind. Ct. App. 1973), discussed in Galanti, 1974 *Survey*, *supra* note 53, at 29-35. The current (b)(10) exemption, IND. CODE § 23-2-1-2(b)(10) (Burns Supp. 1976), exempts a security offer by the issuer if there are no more than 35 purchasers of the securities. The written representation is still required. *Id.* § 23-2-1-2(b)(10)(iii). See generally Galanti, 1975 *Survey*, *supra* note 89, at 59-60; Note, *Maryland Blue Sky Reform: One State's Experiment with the Private Offering Exemption*, 32 MD. L. REV. 273 (1972); Note, *Revising the Private Placement Exemption*, 82 YALE L.J. 1512 (1973).

for exemption by getting "investment letters"<sup>104</sup> from each buyer, or by providing in the stock subscription agreement that the shares were purchased for investment purposes. Since the Act specifically imposes the burden of proof on a party claiming the benefit of an exemption,<sup>105</sup> the exemption claim failed.

Plaintiffs, however, could not rescind the transactions and recover their investment despite the non-exempt sales. The court barred them from recovery under the theory of *in pari delicto*, or equal fault, because they had cooperated with defendants' violation of the Act in not registering the shares. Although there is no Indiana authority on applying the doctrine of *in pari delicto* to the purchase of corporate stock,<sup>106</sup> the court chose to follow an *American Law Reports* annotation<sup>107</sup> positing that purchasers of stock who participate in organizing or managing a corporation are precluded from rescinding their purchases under securities laws.<sup>108</sup>

The annotation points out that under the maxim the defendant prevails when both parties are equally wrong. This accords with the position of Justice Harlan in *Perma Life Mufflers, Inc.*

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<sup>104</sup>Defendant Karol lost on this issue in *Hippensteel v. Karol*, 304 N.E.2d 796 (Ind. Ct. App. 1973). See generally *Doxsee*, *supra* note 54, at 9; 11 *SOWARDS*, *supra* note 52, § 4.02[1][c].

<sup>105</sup>IND. CODE § 23-2-1-16(j) (Burns Supp. 1976) provides that the burden of proof of an exemption or classification "shall be upon the party claiming the benefits of such exemption or classification." See *Worsley v. State*, 317 N.E.2d 908 (Ind. Ct. App. 1974), discussed in *Galanti*, 1975 *Survey*, *supra* note 89, at 50-52; *Hippensteel v. Karol*, 304 N.E.2d 796, 798 (Ind. Ct. App. 1973).

<sup>106</sup>The court did cite *American Mut. Life Ins. Co. v. Bertram*, 70 N.E. 258 (Ind. 1904), in which an insured who had participated in the issuance of illegal insurance contracts was precluded from recovering premiums paid.

<sup>107</sup>Annot., 84 A.L.R.2d 479 (1962). The case giving rise to the annotation, *Popper v. Havana Publications*, 122 So. 2d 247 (Fla. Ct. App. 1960), was actually decided on an estoppel ground. The annotation does discuss the *in pari delicto* doctrine, which appears to be primarily a California development. See cases cited 84 A.L.R.2d at 492. The California cases do make clear that mere knowledge of the illegality does not preclude a purchaser from asserting the invalidity of the contract. See, e.g., *Randall v. California Land Buyers Syndicate*, 217 Cal. 594, 20 P.2d 331 (1933).

<sup>108</sup>Another approach was taken by an Illinois court in *Stevens v. Crystal Lake Trans. Sales, Inc.*, 30 Ill. App. 3d 745, 332 N.E.2d 727 (1975), in which recovery was denied to the purchaser of corporate shares in violation of the Illinois Blue Sky Act, ILL. REV. STAT. ch. 121½, §§ 137.1-19 (1973). The plaintiff, who was president of the corporation, was barred from rescinding the purchase because of the provision in the Illinois Act, *id.* § 137.13, making officers and directors who participate or aid in illegal sales "jointly and severally liable" to the purchasers. This provision, which is similar to IND. CODE § 23-2-1-19(b) (Burns Supp. 1976), was construed to deny rescission to the corporate officer responsible for the violation. See also *Nash v. Jones*, 224 Ga. 372, 162 S.E.2d 392 (1968); *Moore v. Manufacturers Sales Co.*, 335 Mich. 606, 56 N.W.2d 397 (1953). Cf. IND. CODE § 23-2-1-19(a) (Burns Supp. 1976).

*v. International Parts Corp.*<sup>109</sup> However, the *Theye* court overlooked the fact that this view did not prevail in *Perma Life*. Rather the Supreme Court decided the policy of the Sherman Antitrust Act could be best effectuated if parties to unlawful agreements were permitted to bring treble damage actions even though they themselves had incurred some legal liability. Although the *Perma Life* rationale might apply to the *Theye* situation, it does not seem unjust or inequitable to refuse relief to plaintiffs, who actively participated in forming and operating DCA and were not simply innocent purchasers of shares.<sup>110</sup>

On the fraud issue, plaintiffs ran into the inexorable difficulty of reversing the negative judgment that defendants had not committed fraud.<sup>111</sup> There was evidence that Bates had knowingly misrepresented the restaurant's gross income, but there was some unspecified evidence to the contrary. Consequently, there was no error in ruling for defendants.<sup>112</sup>

#### *D. Preincorporation Contracts and the De Facto Doctrine*

A somewhat opaque opinion which may or may not have properly applied corporate law doctrines is *Sunman-Dearborn Community School Corp. v. Kral-Zepf-Freitag & Associates*,<sup>113</sup> in which the First District Court of Appeals reversed a Franklin Circuit Court judgment for plaintiff K.Z.F. in a suit seeking the reasonable value of architectural and engineering services. One difficulty in resolving the issues presented by the case is that it is not easy to

<sup>109</sup>392 U.S. 134, 153 (1958) (Harlan, J., dissenting).

<sup>110</sup>*A.C. Grost & Co. v. Coeur D'Alene Mines Corp.*, 312 U.S. 38 (1941), held that rescission may be denied where the 1933 Act has been violated, if granting relief would frustrate its purpose. However, *Henderson v. Hayden, Stone, Inc.*, 461 F.2d 1069 (5th Cir. 1972), allowed rescission where recovery would fail to serve, but not frustrate, the purpose of the 1933 Act. *In pari delicto* was rejected in sections 12 and 17 and rule 10b-5 action in *Nathanson v. Weis, Voisin, Cannon, Inc.*, 325 F. Supp. 50 (S.D. N.Y. 1971) on policy grounds. Waiver and estoppel, but not laches, were allowed as defenses to a section 12(1) suit in *Straley v. Universal Uranium & Milling Corp.*, 289 F.2d 370 (9th Cir. 1961). See also *Harrison v. Bloomfield Bldg. Indus. Inc.*, 435 F.2d 1192 (6th Cir. 1970); *Kuehnert v. Texstar, Inc.*, 412 F.2d 700 (5th Cir. 1969). See generally 11 SOWARDS, *supra* note 52, § 9.04[2].

<sup>111</sup>See, e.g., *Hippensteel v. Karol*, 304 N.E.2d 796, 798 (Ind. Ct. App. 1973); *Engelbrecht v. Property Developers, Inc.*, 296 N.E.2d 798 (Ind. Ct. App. 1973).

<sup>112</sup>The trial court might not have used the same analysis as the appellate court, but the judgment was affirmed since it was sustainable for the reasons given. See *Sheraton Corp. of America v. Kingsford Packing Co.*, 319 N.E.2d 852 (Ind. Ct. App. 1974).

<sup>113</sup>338 N.E.2d 707 (Ind. Ct. App. 1975) (Lybrook, J.).

"know the players," even with a scorecard. Another is that part of the case appears to have "fallen between the floorboards."

There were two contracts supposedly involved in the dispute: a 1963 contract for architectural and engineering services signed by the trustees of the three school townships involved, and a 1967 contract with a school building corporation signed by school trustees of different townships as officers of the building corporation. The corporation was formed three months *after* the contract was signed and was liquidated before K.Z.F.'s suit was filed. To complicate matters, the school townships had been absorbed by Sunman-Dearborn. At least it was clear Sunman-Dearborn was bound on the valid contracts and obligations of the predecessor school townships, and the issue was whether the predecessor townships had been bound by the contracts.

However, the court discussed only the 1967 contract, and much of the discussion is confusing. After struggling to find the building corporation was the bound entity, the court allowed reformation of the contract to bind the school townships as requested by K.Z.F.<sup>114</sup> The ignored 1963 contract had also been made with the school townships.

Although the battle was won, the war was lost when the court concluded that K.Z.F. had failed to show that the contracts, perhaps including the 1963 agreement, were executed in compliance with the procedures of the Township Reform Act.<sup>115</sup> Consequently the contracts were not enforceable. The court probably should have assumed the contracts were with the school townships and decided the case on the Reform Act ground.

Unfortunately the court seemed determined to find that K.Z.F. had contracted with the building corporation despite the eventual reformation. To bind the corporation, nonexistent when the contract was signed, the court relied primarily on the *de facto* doctrine, which treats a defectively incorporated enterprise as if all the formalities for *de jure* incorporation had been met.<sup>116</sup> The

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<sup>114</sup>The court cited its decision in *Pearson v. Winfield*, 313 N.E.2d 95 (Ind. Ct. App. 1974), as developing the principles underlying reformation of contracts for mutual mistake. See generally 3 A. CORBIN, CONTRACTS § 540 (1960). Part of the confusion of the opinion is that the court at one point stated "absent evidence entitling Kral to reformation . . . [the] school townships were not bound by the agreement." 338 N.E.2d at 710. The court appeared to be stating a conclusion that reformation was not proper, while actually the court was indicating it would see if there was evidence justifying reformation.

<sup>115</sup>IND. CODE §§ 17-4-28-1 to -29-5 (Burns 1974).

<sup>116</sup>The court misstated the doctrine when it said "in an action on a contract with a *de facto* corporation, neither the purported corporate entity nor the party dealing with it as such may question its *de jure* existence." 338 N.E.2d at 709. Actually the doctrine can only apply where the entity is *not*

appellate court thought the doctrine was appropriate because the facts seemed to fit the standard formulation of the doctrine, that is, there was: (1) a valid law under which the corporation could have been validly formed; (2) a colorable attempt to organize thereunder; and (3) an actual exercise of corporate powers.<sup>117</sup>

The court may have had some doubts about the second element because the only effort to incorporate had been an abortive effort to incorporate as a not-for-profit corporation. Consequently, the court backstopped its argument with the separate, but related, principle of equitable estoppel. Under this approach, a person who deals with an entity held out as a corporation cannot assert the nonexistence of the corporation when a dispute arises.<sup>118</sup>

One problem with the court's approach is it ignores the possibility, albeit remote, that the de facto and estoppel concepts are no longer good law in Indiana. Cases<sup>119</sup> do support the doctrines, but they do not consider the impact and interaction of sections 23-1-3-4 and 23-1-10-5 of the Indiana General Corporation Act. The former provides that corporate existence commences when the certificate of incorporation is issued and that the certificate is "conclusive evidence of the fact that the corporation has been incorporated." It is therefore not inconceivable that corporate existence in any form is precluded unless the certificate has been issued. At this point the corporation's de jure status is presumed.<sup>120</sup> The legis-

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a de jure corporation because of failure to comply substantially with all mandatory conditions precedent to incorporation. 3A CAVITCH, *supra* note 1, § 63.02[1]. Under the de facto doctrine, the defectively organized entity is regarded as a corporation for most purposes except direct attack on its existence by the state. HENN, *supra* note 1, § 140. See generally 3A CAVITCH, *supra* note 1, §§ 63.01-.04; 8 FLETCHER, *supra* note 1, §§ 3759-65; HENN, *supra* note 1, §§ 139-45; LATTIN, *supra* note 1, §§ 56-61.

<sup>117</sup>Some authorities require a fourth element, good faith, *see, e.g.*, *United Sewing Mach. Distrib. Inc. v. Calhoun*, 95 So. 2d 453 (Miss. 1957); *see also* Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1156 (1952), but it is often omitted because "good faith" is encompassed by the colorable compliance element. HENN, *supra* note 1, § 140, at 240.

<sup>118</sup>*See* *Jennings v. Dark*, 175 Ind. 332, 92 N.E. 778 (1910) (de facto existence is generally not considered a prerequisite for the application of equitable estoppel). For a discussion of "corporation-by-estoppel", *see* 3A CAVITCH, *supra* note 1, § 63.04[2]; HENN, *supra* note 1, § 141; LATTIN, *supra* note 1, § 59; Comment, *Estoppel to Deny Corporate Existence*, 31 TENN. L. REV. 336 (1964).

<sup>119</sup>*See, e.g.*, *Jennings v. Dark*, 175 Ind. 332, 92 N.E. 778 (1910); *Aetna Life Ins. Co. v. Weatherhogg*, 103 Ind. App. 506, 4 N.E.2d 679 (1936).

<sup>120</sup>*See* *Western Mach. Works v. Edwards Mach. & Tool Corp.*, 223 Ind. 655, 63 N.E.2d 535 (1945), holding that the statutory conditions before commencing business, now codified at IND. CODE § 23-1-3-5 (Burns Supp. 1976), had nothing to do with the formalities required for de jure existence. *See generally* 3A CAVITCH, *supra* note 1, § 63.02[2]; HENN, *supra* note 1, § 142.

lature obviously intended to discourage exercise of corporate powers without compliance with the Act by imposing, under section 23-1-10-5, criminal and civil liability on persons who knowingly, willfully and with intent to defraud use the name of or act on behalf of a corporation before it has been authorized to do business. Denying de facto corporateness would help accomplish this objective.

Furthermore, there is some authority that the two sections, which are similar to sections 56 and 146, respectively, of the Model Business Corporation Act,<sup>121</sup> taken together eliminate the de facto doctrine and estoppel. In *Robertson v. Levy*<sup>122</sup> the court construed two provisions of the District of Columbia corporation act based on the Model Act provisions<sup>123</sup> to eliminate the doctrines. According to *Robertson* all corporate attributes, including limited liability, commence when the certificate is issued. The concept of de facto incorporation has been criticized,<sup>124</sup> and the criticisms are probably well taken; but vengeance might not be "ours" and, under appropriate circumstances, perhaps a court should bind the purported corporation or the other party to a contract.<sup>125</sup> To a certain extent the *Robertson* approach was recognized in *Edward Shoes, Inc. v. Orenstein*,<sup>126</sup> in which section 23-1-10-5 was construed as

<sup>121</sup>2 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 56, 146 (2d ed. 1971).

<sup>122</sup>197 A.2d 443 (D.C. Ct. App. 1964). See 3A CAVITCH, *supra* note 1, § 63.02[2]; HENN, *supra* note 1, §§ 140-42. See also *Swindel v. Kelly*, 499 P.2d 291 (Alas. 1972); *Kiamasha Dev. Corp. v. Guild Property, Inc.*, 4 N.Y.2d 378, 151 N.E.2d 214, 175 N.Y.S.2d 63 (1958); *Timberline Equip. Co. Inc. v. Davenport*, 267 Ore. 64, 514 P.2d 1109 (1973); 3A CAVITCH, *supra* note 1, § 63.02[2] [a]. The comment to Model Act section 56 states that under its unequivocal provisions, any steps short of securing a certification of incorporation would not constitute apparent compliance. Therefore a de facto corporation cannot exist under the Model Act. 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 56, ¶2 (2d ed. 1971). This is even stronger language than the comparable comment to former section 50. 1 ABA-ALI MODEL BUS. CORP. ACT ANN. § 50, ¶4 (1960). But see *Cranson v. International Bus. Machs. Corp.*, 234 Md. 477, 200 A.2d 33 (1964); *Vincent Drug Co. v. Utah State Tax Comm'n*, 17 Utah 2d 202, 407 P.2d 683 (1965).

<sup>123</sup>The Model Act provisions were then numbered sections 50 and 139. See 1 ABA-ALI MODEL BUS. CORP. ACT ANN. §§ 50, 139 (1960).

<sup>124</sup>See, e.g., Frey, *Legal Analysis and the "De Facto" Doctrine*, 100 U. PA. L. REV. 1153, 1178-80 (1952).

<sup>125</sup>See Comment, 43 N.C. L. REV. 206, 210 (1964) criticizing *Robertson* for abolishing the estoppel concept as well as the de facto doctrine. The author points out that estoppel applies to a particular transaction, while the de facto doctrine imparts a general corporate status; and that the security of certain transactions should be protected. The author does recognize that estoppel should apply only where all the traditional elements have been satisfied. *Id.* at 208. Cavitch also acknowledges the tempering effect of estoppel. 3A CAVITCH, *supra* note 1, § 63.04[2] at 63-77.

<sup>126</sup>333 F. Supp. 39 (N.D. Ind. 1971).

eliminating common law liability for defective incorporation and requiring fraudulent conduct before a shareholder could be held liable to a creditor.

Admittedly, there are certain difficulties with construing the Act as abolishing the two doctrines. First, section 23-1-10-5 requires a fraudulent intent before personal liability will be imposed, unlike section 146 of the Model Act. This creates an obvious distinction.<sup>127</sup> Second, the Indiana provisions predate the Model Act provisions relied on in *Robertson*, and cases such as *Aetna Life Insurance Co. v. Weatherhogg*,<sup>128</sup> recognizing both doctrines, would have to be overruled. *Sunman-Dearborn* may be correct, but it would have been interesting if the court had analyzed the impact of the two provisions on the de facto doctrine.

Another intriguing aspect of *Sunman-Dearborn* is that the court, and perhaps the parties, apparently did not recognize that the 1967 contract was a preincorporation contract. The court could then have absolved the school townships by applying the settled rule that a corporation is not bound on promoter's contracts made on its behalf prior to incorporation unless it expressly, or perhaps impliedly, assumes responsibility.<sup>129</sup> However, the failure to discuss the preincorporation contract may be attributable to the fact that there was evidence tending to show that the townships had taken some steps which might have been deemed an adoption of the contract.

K.Z.F. might have been more successful if it had pursued the trustees as promoters. It is well settled that promoters who contract for nonexistent corporations are personally liable on the contracts unless it can be clearly shown the third party did not intend to bind them personally.<sup>130</sup> The trustees would have argued

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<sup>127</sup>The court in *Cranson v. International Bus. Machs. Corp.*, 234 Md. 477, 200 A.2d 33 (1964), implicitly assumed that section 56, specifying the effect of the certificate, did not by itself preclude an estoppel defense. See W. CARY, *CASES AND MATERIALS ON CORPORATIONS* 79 (4th ed. unabrid. 1969); Comment, 43 N.C. L. REV. 206 (1964).

<sup>128</sup>103 Ind. App. 506, 4 N.E.2d 679 (1936).

<sup>129</sup>See *Speedway Realty Co. v. Grasshoff Realty Corp.*, 248 Ind. 6, 216 N.E.2d 845 (1966); *Indianapolis Blue Print & Mfg. Co. v. Kennedy*, 215 Ind. 409, 19 N.E.2d 554 (1939). See also *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N.W. 216 (1892). See generally 3 CAVITCH, *supra* note 1, § 56.02; HENN, *supra* note 1, §§ 108-14; LATTIN, *supra* note 1, § 29-30.

<sup>130</sup>*Stanley J. How & Assocs., Inc. v. Boss*, 222 F. Supp. 936 (S.D. Iowa 1963); *Decker v. Juzwick*, 121 N.W.2d 652 (Iowa 1963); *O'Rorke v. Geary*, 207 Pa. 240, 56 A. 541 (1903). See generally 3 CAVITCH, *supra* note 1, § 56.01[2]; HENN, *supra* note 1, § 108, at 181; RESTATEMENT (SECOND) OF AGENCY §§ 326-27 (1958); Note, *Preincorporation Agreements*, 11 SW. L.J. 509 (1957). Generally, promoters are bound under a contract theory, but they can be bound for breach of an implied warranty of authority from a



that signing as officers of the building corporation expressed an intent not to be personally bound. This might have been so, but it is not certain that it would have overcome what amounts to a presumption in favor of the promoter's liability. For example, in the leading case of *Stanley J. How & Associates, Inc. v. Boss*<sup>131</sup> the court held that a contract signed by Boss as "agent for a Minnesota corporation to be formed who will be the obligor"<sup>132</sup> did not establish that How was to look only to the new corporation and not to Boss. The court noted the parties might have contemplated a novation whereby Boss would be liable only until the corporation was formed and became bound on the contract.<sup>133</sup>

Of course the third party can agree to look only to the contemplated corporation for performance of the contract, in effect making an offer and taking the risk that the corporation will be formed and assume liability.<sup>134</sup> A case on point here is *Quaker Hill, Inc. v. Parr*.<sup>135</sup> Defendants contemplated organizing a cemetery and ordered nursery stock, at plaintiff's urging, before the corporation was formed. The particular corporation was never formed, but the promoters were excused notwithstanding the general rule because clearly plaintiff did not intend to bind them personally. *Quaker Hill* may be particularly appropriate in a *Sunman-Dearborn* situation because the signers were not engaged in a true business venture. In fact, it is not impossible that the *Sunman-Dearborn* court used the de facto-estoppel issue just to

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nonexistent principal. See HENN, *supra* note 1, § 108, at 181 n.13. Of course if the third party is aware that the corporation has not yet been formed the implied warranty would be negated. Professor Henn discusses the various categories of promoter-third party contracts at *id.* §§ 108-614.

<sup>131</sup>222 F. Supp. 936 (S.D. Iowa 1963).

<sup>132</sup>*Id.* at 939.

<sup>133</sup>When a novation occurs the corporation is substituted for the promoter as the party bound on the contract in all respects, and the liability of the promoter ceases. See HENN, *supra* note 1, § 111, at 185. The same result occurs when a court permits a preincorporation contract to be "ratified", see, e.g., *Chartrand v. Barney's Club, Inc.*, 380 F.2d 97 (9th Cir. 1967), despite the theoretical difficulty presented by the nonexistent principal. See *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N.W. 216 (1892); 1 RESTATEMENT (SECOND) OF AGENCY § 82 (1958); see generally HENN, *supra* at 184. Adoption of a contract by a newly formed corporation does not end the liability of the promoter to the third party. *Stanley J. How & Assocs., Inc. v. Boss*, 222 F. Supp. 936 (S.D. Iowa 1963); HENN, *supra* at 185.

<sup>134</sup>*Stewart Realty Co. v. Keller*, 118 Ohio App. 49, 193 N.E.2d 179 (1962). If the promoter is responsible for the corporation's not being formed, liability might be based on misrepresentation or a breach of an implied promise to form the corporation. See HENN, *supra* note 1, §§ 108 at 181 n.13, 110; see generally 3 CAVITCH, *supra* note 1, § 56.01[3].

<sup>135</sup>148 Colo. 45, 364 P.2d 1056 (1961). See generally HENN, *supra* note 1, § 109.



protect the trustees. The decision was equitable and fair,<sup>136</sup> but certainly not clear or explicit.

As noted above, Sunman-Dearborn ultimately escaped liability for the 1967 contract, and probably the 1963 contract, under the Township Reform Act.<sup>137</sup> The Act was construed as precluding contracts not made in accordance with its requirements because of the provision declaring noncomplying contracts "null and void."<sup>138</sup> Unlike the interpretation of some statutes, where "void" is construed as "voidable,"<sup>139</sup> the courts have applied the Township Reform Act in a rather draconian fashion, so that the Act appears to be an absolute bar to recovery under any theory including *quantum meruit*.<sup>140</sup>

### E. Statutory Developments

The 1976 session of the Indiana General Assembly produced only two statutory developments of significance.<sup>141</sup> The first involved several amendments to the Indiana Business Takeover

<sup>136</sup>See Comment, 43 N.C. L. REV. 206, 211 (1964).

<sup>137</sup>IND. CODE §§ 17-4-28-1 to -29-6 (Burns 1974).

<sup>138</sup>*Id.* § 17-4-29-5. See, e.g., *State ex rel. Siebrase v. Meiser*, 201 Ind. 337, 168 N.E. 185 (1929); *Peck-Williamson Heating & Ventilating Co. v. Steen School Township*, 30 Ind. App. 637, 66 N.E. 909 (1903). The *Sunman-Dearborn* court stated that the Act requires: (1) authorization and approval of trustee contracts by the township advisory board; (2) appropriation of funds for payment of contemplated services; and (3) a complete written record of authorization, approvals and appropriation. See *Heeter v. Western Boone Co. Community School Corp.*, 147 Ind. App. 153, 259 N.E. 99 (1970).

<sup>139</sup>See, e.g., *Doney v. Laughlin*, 50 Ind. App. 38, 41-43, 94 N.E. 1027, 1028 (1911); see also *State ex rel. State Tax Comm'n v. Garcia*, 77 N.M. 703, 705, 427 P.2d 230, 232 (1967).

<sup>140</sup>*Miller v. Jackson Township*, 178 Ind. 503, 99 N.E. 102 (1912); *Heeter v. Western Boone Co. Community School Corp.*, 147 Ind. App. 153, 259 N.E.2d 99 (1970). To rub salt into K.Z.F.'s wounds, since it might have been an innocent victim acting in good faith, the *Sunman-Dearborn* court considered the township trustees as special agents with limited statutory authority, and K.Z.F. therefore had the burden of establishing their authority and compliance with the Act. *Mitchelltree School Township v. Hall*, 163 Ind. 667, 72 N.E. 641 (1904). Failure to sustain this burden required reversal.

<sup>141</sup>Other enactments worth noting are IND. CODE § 23-2-1-15(c) (Burns Supp. 1976), amending *id.* § 23-2-1-15(c) (Burns 1972) to provide that funds accruing from the operation of the Securities Division are to be placed in the Indiana general fund rather than a special account; and *id.* § 23-2-1-15(d) (Burns Supp. 1976) to provide that the expenses incurred by the Attorney General in assisting the Securities Division should be paid out of funds appropriated to the Attorney General for the administration of his office.

Act.<sup>142</sup> The amendment to Indiana Code section 23-2-3-1(i)(2) reduced the threshold of application, and hence increased the number of target companies protected by the Act. The Act originally was inapplicable to takeovers of target companies with less than 100 shareholders of record at the time of the offer.<sup>143</sup> This figure was reduced to 50. Consequently, companies with 50 to 100 shareholders are now covered.

The amendments to sections 23-2-3-12(b) and (c) clarified the application of the Act to certain types of regulated companies. The Act originally exempted acquisitions of financial institutions whose securities are subject to regulation by the Department of Financial Institutions.<sup>144</sup> The 1976 amendment limits the exemption to situations in which the takeover offer is subject to approval by the Department. A similar change was made for corporations subject to regulation by the Public Service Commission.<sup>145</sup> These changes make the Act internally consistent since the Act originally applied to other regulated industries only when the contemplated acquisition was subject to approval by another agency.<sup>146</sup>

The amendments also allow appeals from final orders of the Securities Commissioner to the appellate courts and application to the supreme court for a petition to transfer the cause, as with other civil cases.<sup>147</sup> Formerly, appeals were to the circuit or superior courts.<sup>148</sup> Amended section 23-2-3-11 now provides that an assignment of errors that the Commissioner's decision is contrary to law presents issues of both the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of fact upon which it was rendered.

The other statutory development of significance was a change in the provisions of the General Corporation Act regulating the

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<sup>142</sup>IND. CODE §§ 23-2-3-1(1), -11, -12(b), (c) (Burns Supp. 1976). The Business Takeover Act was adopted in 1975 and is discussed in Galanti, 1975 *Survey*, *supra* note 89, at 52-59.

<sup>143</sup>Act of Apr. 29, 1975, Pub. L. No. 263, § 1, 1975 Ind. Acts 1471.

<sup>144</sup>*Id.* § 12, 1975 Ind. Acts 1481. The Financial Institutions Act, IND. CODE §§ 28-1-1-1 to -8-3 (Burns 1973) describes the institutions whose securities are regulated by the Department of Financial Institutions.

<sup>145</sup>IND. CODE §§ 8-1-1-1 to -9-37 (Burns 1973) describes corporations subject to Public Service Commission regulation.

<sup>146</sup>Takeovers of insurance companies were exempted from the outset where the offer is subject to the approval of the Insurance Commissioner or is exempt from such approval. *Id.* § 23-2-3-12(a) (Burns Supp. 1976). The authority of the Insurance Commissioner is found in *id.* §§ 27-1-1-1 to -5 (Burns 1975). Takeovers of corporations subject to federal regulation were exempted where the takeover is subject to approval by a particular agency. *Id.* § 23-2-3-12(d) (Burns Supp. 1976).

<sup>147</sup>IND. CODE § 23-2-3-11 (Burns Supp. 1976).

<sup>148</sup>Act of Apr. 29, 1975, Pub. L. No. 263, § 11, 1975 Ind. Acts 1480-81.

admission of foreign corporations.<sup>149</sup> A perennial problem for such corporations has been the requirement that no corporation may be admitted if its corporate name is the same as, or confusingly similar to, the name of an Indiana corporation or a foreign corporation already authorized to transact business in the state.<sup>150</sup> This might not be a problem for a corporation in a developmental stage, but an existing foreign corporation is faced with the choice of either changing its name in its home state or getting the consent of the other corporation. Often, neither alternative is practicable. The amendment solves the problem by permitting such corporations to qualify under an assumed business name. Thus, a corporation can select a name for use in Indiana without disturbing its operations in other jurisdictions.

Conceptually, this approach presents no problems because the Indiana Assumed Business Names Act<sup>151</sup> clearly permits a corporation to do business under a name other than its formal corporate name. In order to qualify under amended section 23-1-11-3, the corporation must have made a good faith, but unsuccessful, effort to obtain the written consent from the other corporation to use the name, documented by an affidavit signed by the two principal officers of the corporation. The admission application must reflect both the true corporate name and the assumed name; and the corporation must file the affidavit and the certificate of assumed business name<sup>152</sup> in addition to the other documentation a foreign corporation must file in order to be admitted.<sup>153</sup>

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<sup>149</sup>IND. CODE § 23-1-11-3 (Burns Supp. 1976), *amending id.* § 23-1-11-3 (Burns 1972).

<sup>150</sup>*Id.* § 23-1-11-3(b) (Burns Supp. 1976). For a slightly different approach to this problem, *see* 2 ABA-ALI MODEL BUS. CORP. ACT ANN. § 108, ¶ 2 (2d ed. 1971).

<sup>151</sup>IND. CODE § 23-15-1-1 (Burns Supp. 1976). Some jurisdictions apparently do not. *See* *Kansas Milling Co. v. Ryan*, 152 Kan. 137, 102 P.2d 970 (1940); *People v. Ferdinand*, 172 Misc. 595, 15 N.Y.S.2d 506 (Mag. Ct. 1939). *See also* *Seagram Distillers Co. v. Foremost Sales Promotions, Inc.*, 13 Ill. App. 3d 166, 300 N.E.2d 490 (1973).

<sup>152</sup>IND. CODE § 23-15-1-1 (Burns 1972).

<sup>153</sup>*Id.* § 23-1-11-4.

#### IV. Civil Procedure and Jurisdiction

William F. Harvey\*

##### A. Jurisdiction and Service of Process

In *In re Public Law No. 305 and Public Law No. 309 of Indiana Acts of 1975*,<sup>1</sup> the Indiana Supreme Court clearly maintained its control over procedural practices in the courts. Public Laws 305 and 309 required judicial notice to be taken of municipal, city, and town ordinances,<sup>2</sup> a practice clearly contrary to prior Indiana procedure which did not permit judicial notice of such ordinances because the lack of organized codification in many cities requires time-consuming searches to find the relevant ordinance.<sup>3</sup> The court held that pursuant to Indiana Code section 34-5-2-1,<sup>4</sup> procedural rules and cases decided by courts take precedence over statutes enacted by the legislature concerning procedural issues.<sup>5</sup> Finding the judicial notice requirements of Public Laws 305 and 309 to be procedural, the court held them invalid. The opinion does not state that the legislature may not pass statutes concerning procedure, but it does hold that, insofar as statutes conflict with judge-made procedural rules and court precedents, they will not be controlling.<sup>6</sup> Where the procedural

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<sup>1</sup>334 N.E.2d 659 (Ind. 1975), also discussed in Marple, *Evidence, infra* and Marsh, *Constitutional Law, infra*.

<sup>2</sup>Pub. L. No. 305, § 48, 1975 Ind. Acts 1667 (repealed 1976); IND. CODE § 33-5-43.1-12 (Burns Supp. 1976).

IND. CODE § 33-11.6-4-11 (Burns Supp. 1976) contains a similar provision, but was not ruled invalid because it applies to small claims courts of first class cities, which are not courts of record and are subject to de novo review. 334 N.E.2d at 661.

<sup>3</sup>*Indianapolis Traction & Terminal Co. v. Hensley*, 186 Ind. 479, 115 N.E. 934 (1917); see also *McClurg v. Carte, Inc.*, 255 Ind. 110, 262 N.E.2d 854 (1970).

<sup>4</sup>IND. CODE § 34-5-2-1 (Burns 1973) gives the supreme court power to adopt and rescind rules of practice and procedure and provides that "all laws in conflict therewith shall be of no further force or effect."

<sup>5</sup>334 N.E.2d at 662.

<sup>6</sup>"The above-noted provisions [Public Laws 309, 305] are invalid for the reason that they concern procedural matter contrary to procedure previously adopted by this Court." *Id.*

rule and the statute are compatible, the former will not preempt the latter.

Certain lawsuits require notice to public officials as a precondition to a court's jurisdiction. In *Sendak v. Debro*<sup>7</sup> the plaintiff failed to notify the attorney general of a declaratory judgment action questioning the constitutionality of a state statute.<sup>8</sup> After learning from a newspaper reporter that the Monroe County Superior Court had declared unconstitutional a statute requiring freehold status for nomination to public office,<sup>9</sup> the attorney general filed a motion to intervene which was granted, and motions to correct error and for a new trial which were denied. The supreme court reversed the decision of the trial court with instructions to grant a new trial, explicitly refusing to hear the case on the merits. Justice DeBruler, writing for the unanimous court, agreed with the holding in *State ex rel. Blake v. Madison Circuit Court*<sup>10</sup> that the notice requirement was both mandatory and jurisdictional,<sup>11</sup> and rejected the appellee's novel argument that Trial Rule 57 supersedes the notice requirement of the statute. The court stated that the statute and rule are not incompatible, because each deals with different aspects of declaratory judgments; therefore the rule does not supersede the statute.<sup>12</sup>

In *Board of Commissioners v. Briggs*,<sup>13</sup> a tort action was brought against the county for personal injury allegedly resulting from improper maintenance of warning signs on the highway. The plaintiff failed to file a claim with the county auditor before suit, as required in Indiana Code section 17-2-1-4.<sup>14</sup> Because of

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<sup>7</sup>343 N.E.2d 779 (Ind. 1976).

<sup>8</sup>IND. CODE § 34-4-10-11 (Burns 1973) provides:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

<sup>9</sup>IND. CODE § 17-4-28-1 (Burns 1974).

<sup>10</sup>244 Ind. 612, 193 N.E.2d 251 (1963).

<sup>11</sup>343 N.E.2d at 781.

<sup>12</sup>*Id.* at 782.

<sup>13</sup>340 N.E.2d 373 (Ind. Ct. App. 1976).

<sup>14</sup>IND. CODE § 17-2-1-4 (Burns 1974) provides:

"No court shall have original jurisdiction of any claim against any county in this state, in any manner, except as provided for in this act [§ 17-2-1-1—17-2-1-4]." The entire act provides the procedure to be followed:

- (1) Claim is filed with the county auditor;
- (2) County commissioners examine merits of the claim and allow or disallow

the defendant's failure to raise this procedural issue until his petition for rehearing, the First District Court of Appeals refused to reverse the verdict for the plaintiff. In doing so, the court distinguished two lines of Indiana cases concerning waiver of jurisdiction.

There are two theories regarding jurisdiction and waiver. *Cooper v. County Board of Review*,<sup>15</sup> a 1971 decision of the court of appeals, holds that subject matter jurisdiction cannot be waived and may be raised at any time during the action. On the other hand, *Bass Foundry & Machine Works v. Board of Commissioners*<sup>16</sup> and other supreme court cases<sup>17</sup> hold that in courts of general jurisdiction there is a presumption of jurisdiction, and that a claim of lack of jurisdiction is a matter of defense only and therefore waivable.<sup>18</sup> The court of appeals found the distinction to be based upon the different theories of the cases. In *Cooper*, the plaintiff sought a statutory tort remedy, in which jurisdiction is specific.<sup>19</sup> In *Bass Foundry*, the plaintiff sought recovery for a common law tort, requiring only a court of general jurisdiction. Notice required for common law torts is merely a procedural condition precedent to recovery and hence subject to waiver, whereas notice required in the legislation creating a statutory tort is jurisdictional and non-waivable.<sup>20</sup> Thus, the court of

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in whole or part at their discretion;

(3) Appeal is made to the circuit or superior court within 30 days. If the claim is denied in whole or part the appeal, at the appellant's option, can be a de novo action.

<sup>15</sup>150 Ind. App. 232, 276 N.E.2d 533 (1971).

<sup>16</sup>115 Ind. 234, 17 N.E. 593 (1888).

<sup>17</sup>*State ex rel. Johnson v. Reeves*, 234 Ind. 225, 125 N.E.2d 794 (1955); *Pittsburgh, C. C. & St. L. Ry. v. Gregg*, 181 Ind. 42, 102 N.E. 961 (1914); *McCoy v. Able*, 131 Ind. 417, 30 N.E. 528 (1892); *Board of Comm'rs v. Arnett*, 116 Ind. 438, 19 N.E. 299 (1889); *Board of Comm'rs v. Leggett*, 115 Ind. 544, 18 N.E. 53 (1888).

<sup>18</sup>*See Thompson v. City of Aurora*, 325 N.E.2d 839 (Ind. 1975), noted in Harvey, *Civil Procedure and Jurisdiction, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 66, 71-72 (1975) [hereinafter cited as Harvey, 1975 Survey].

<sup>19</sup>340 N.E.2d at 377.

<sup>20</sup>The court cites *Bass* for the proposition that:

[I]n cases of the latter class, and all others analogous thereto, it has been uniformly ruled that the complaint need not show the jurisdictional facts upon its face. Of course, the rule is different in respect to courts of inferior or limited jurisdiction, or where a court of general jurisdiction is exercising a mere statutory power and is not exercising a jurisdiction which was according to the course of the common law.

*Id.*, quoting from *Bass Foundry & Machine Works v. Board of Comm'rs*, 115 Ind. at 242, 17 N.E. at 596 (emphasis by the *Briggs* court).

appeals applied the *Cooper* rule in *Briggs*. The one case not conforming to this analysis, *Foster v. County Commissioners*,<sup>21</sup> was modified to comport with the *Briggs* analysis.

Two cases decided during the survey period dealing with service of process bring into focus Trial Rule 4.15(F).<sup>22</sup> *Glennar Mercury-Lincoln, Inc. v. Riley*<sup>23</sup> resulted in a default judgment against the defendant for failure to appear. The Second District Court of Appeals upheld the judgment, concluding that the plaintiff's service procedure was sufficient to allow the trial court to have found that the method chosen was reasonably adequate to accomplish service.<sup>24</sup> In the course of the opinion, the statutory requirement that service be reasonably calculated to inform was distinguished from "actual knowledge" of the suit. "Reasonably calculated" flows from proper service as required by Trial Rule 4, and, even though the party served has no actual knowledge of the suit, the court has jurisdiction.<sup>25</sup> On the other hand, if the defendant acquires actual knowledge of the suit through means other than proper service under Trial Rule 4, the court does not necessarily acquire jurisdiction.<sup>26</sup> As a limitation on this general distinction, the court in dictum stated that actual knowledge is relevant in determining adequacy of service under Trial Rule 4.15(F), but is insufficient in itself to meet the requirement.<sup>27</sup>

Indiana's "long-arm" statute permits service on out-of-state residents. In *Chulchian v. Franklin*<sup>28</sup> the plaintiff brought a malicious prosecution action in federal court against the district attorney and justice of the peace of Las Vegas, Nevada after the Nevada officials had caused the plaintiff to be arrested and incarcerated in Muncie, Indiana, on kidnapping charges. The federal district court dismissed the action for lack of personal jurisdiction, holding that "long-arm" jurisdiction is limited to claims

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<sup>21</sup>325 N.E.2d 223 (Ind. Ct. App. 1975). See also Harvey, 1975 Survey, *supra* note 18, at 70.

<sup>22</sup>IND. R. TR. P. 4.15(F) provides:

No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

<sup>23</sup>338 N.E.2d 670 (Ind. Ct. App. 1975).

<sup>24</sup>*Id.* at 676.

<sup>25</sup>*Id.* at 675, citing *Milosavljevic v. Brooks*, 55 F.R.D. 543 (N.D. Ind. 1972).

<sup>26</sup>338 N.E.2d at 675, citing *Wuchter v. Pizzutti*, 276 U.S. 13 (1928).

<sup>27</sup>338 N.E.2d at 675. In *Chesser v. Chesser*, 343 N.E.2d 810 (Ind. Ct. App. 1976), the court applied the rule of *Glennar Mercury-Lincoln* to reverse a default judgment in a dissolution of marriage proceeding. For a discussion of *Chesser*, see Proffitt, *Domestic Relations*, *infra*.

<sup>28</sup>392 F. Supp. 203 (S.D. Ind. 1975).

arising from acts of defendants specifically enumerated in Trial Rule 4.4(A).<sup>29</sup> None of the acts complained about occurred in Indiana, and therefore no "long-arm" service is proper in such actions.

The defense in *Kinslow v. Cook*<sup>30</sup> relied on Indiana Code section 34-1-1-8, which created a preference for the father of a deceased minor as the plaintiff in a wrongful death action, to dismiss an action brought by the mother of the deceased minor.<sup>31</sup> The mother, in the complaint, made no showing that the minor's father was incapable of bringing the claim, as required by the statute. The First District Court of Appeals reversed the trial court's dismissal, holding that the statutory language "in case of his death, or desertion of his family, or imprisonment"<sup>32</sup> was constitutionally defective because it arbitrarily precluded the mother from proving her rights and duties concerning the deceased child.<sup>33</sup> Hereafter,

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<sup>29</sup>*Id.* at 205. IND. R. TR. P. 4.4(A) provides:

Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

- (1) doing any business in this state;
- (2) causing personal injury or property damage by an act or omission done within this state;
- (3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;
- (4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;
- (5) owning, using, or possessing any real property or an interest in real property within this state; or
- (6) contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made;
- (7) living in the marital relationship within the state notwithstanding subsequent departures from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

<sup>30</sup>333 N.E.2d 819 (Ind. Ct. App. 1975). For a further discussion of this case, see Marsh, *Constitutional Law*, *infra*.

<sup>31</sup>Ch. 112 § 1, 1951 Ind. Acts 107, as amended, IND. CODE § 34-1-1-8 (Burns Supp. 1976), provided, in pertinent part: "A father, or in the case of his death, or desertion of his family, or imprisonment, the mother, or in case of divorce the person to whom custody of the child was awarded, may maintain an action for the injury or death of a child . . . ."

<sup>32</sup>*Id.*

<sup>33</sup>333 N.E.2d at 822-23. The appellee also argued that the prevention of double recovery was a legitimate governmental objective. The court recog-



actions for the wrongful death of a minor child may be brought by either parent. The Indiana legislature somewhat limited the result in *Kinslow* by amending the statute in 1975 to allow the action to be brought by either parent as long as the other parent is joined in some manner.<sup>34</sup> The purpose of this amendment is to prevent double recovery while satisfying constitutional requirements by allowing either parent to bring the action.

When a party commences an action and objection is made to his interest, the action cannot be dismissed until the real party in interest has a reasonable time to ratify, to be joined, or to be substituted in the action. The real party's action relates back to the filing of the complaint.<sup>35</sup> The case of *Childs v. Rayburn*<sup>36</sup> raised the issue of what constitutes a reasonable time. The original wrongful death complaint was filed by the minor deceased's father as administrator of the estate. Four years later, at the close of the plaintiff's evidence during the trial, the defendant moved for judgment on the evidence, alleging that the administrator was not the proper party to bring the action. While provisionally granting the defendant's motion, the trial court allowed the plaintiff to amend the pleading to include the real party in interest,

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nized the validity of the argument, but found that the means chosen to accomplish the statutory objective was purely arbitrary and irrational. *Id.* at 821. The subsequent amendment to the statute eliminates the possibility of double recovery by forcing joinder of both husband and wife in some capacity. See note 34 *infra*. The court also suggested that double recovery can be prevented by the ease with which parties may be joined under the trial rules. 333 N.E.2d at 821 n.4.

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The father and mother jointly, or either of them by naming the other parent as a co-defendant to answer as to his or her interest, or in case of divorce or dissolution of marriage the person to whom custody of the child was awarded, may maintain an action for the injury or death of a child . . . .

IND. CODE § 34-1-1-8 (Burns Supp. 1976).

<sup>35</sup>IND. R. TR. P. 17(A) provides in part:

Every action shall be prosecuted in the name of the real party in interest.

. . . .

(2) When a statute provides for an action by this state on the relation of another, the action may be brought in the name of the person for whose use or benefit the statute was intended.

No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time after objection has been allowed for the real party in interest to ratify the action, or to be joined or substituted in the action. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced initially in the name of the real party in interest.

<sup>36</sup>346 N.E.2d 655 (Ind. Ct. App. 1976).

the father as guardian of the deceased.<sup>37</sup> After the amendment, the trial court denied the defendant's motion for judgment on the evidence. The First District Court of Appeals affirmed the trial court's action, holding that the substitution of parties was prompt and without confusion, that the evidence and proof involved were unchanged by the amendment, and that no parties were added or removed.<sup>38</sup> Additional support for the holding was the fact that the defendant failed to prove prejudice or to request a continuance as permitted under Trial Rule 15(A).<sup>39</sup> Because of the relation back of the amendment pursuant to Trial Rule 17(A) (2), no statute of limitations objection was possible.<sup>40</sup>

The Second District Court of Appeals decision in *Cordill v. City of Indianapolis*<sup>41</sup> is controversial since it creates practical difficulties for litigation attorneys. The action was in eminent domain, which essentially entails two stages: (1) approval of the taking, and (2) a subsequent approval of the compensation for the taking.<sup>42</sup> The defendant made no objection to the taking, but he did object to the compensation. However, his objection was not filed within ten days as required by statute<sup>43</sup> because his attorney did not receive notice from the court clerk that the appraisal had been filed. Although the attorney claimed to have filed an appearance, there was no such entry in the court record. The court of appeals held that when a proper appearance is not entered in the record, the clerk has no duty to serve the order.<sup>44</sup> In dictum, Judge White stated that as a practical matter the attorney has a duty to see that his appearance is both "filed and recorded," even to the extent of anticipating that the clerk will make mistakes.<sup>45</sup> Judge Sullivan dissented, stating that the spirit of Trial Rule 5(A) requires service on the parties either directly, if the party is not represented, or indirectly through the attorney.<sup>46</sup> In Judge Sullivan's opinion, the requirement of both filing and supervising

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<sup>37</sup>IND. CODE § 34-1-1-8 (Burns Supp. 1976). The trial court used Trial Rule 15(A) in permitting the amendment.

<sup>38</sup>346 N.E.2d at 661.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 661-62, citing IND. R. TR. P. 17(A) (2).

<sup>41</sup>345 N.E.2d 274 (Ind. Ct. App. 1976).

<sup>42</sup>IND. CODE § 32-11-1-8 (Burns 1973), as amended, *id.* (Burns Supp. 1976).

<sup>43</sup>The statute was amended in 1975 to require giving notice of the filing of the appraiser's report to all known parties to the action and their attorneys and extends the time for objection from 10 to 20 days. IND. CODE § 32-11-1-8 (Burns Supp. 1976), amending *id.* (Burns 1973).

<sup>44</sup>345 N.E.2d at 276-77.

<sup>45</sup>*Id.* at 278.

<sup>46</sup>*Id.* at 280 (Sullivan, J., dissenting).

the entrance of appearance places an unconscionable burden on the attorney.<sup>47</sup>

Once a trial court has assumed jurisdiction, it can relinquish it in certain circumstances. In *Indiana State Fair Board v. Hockey Corp. of America*,<sup>48</sup> the Second District Court of Appeals dealt with the effect of a change of venue on the original trial court's jurisdiction. The law is that until complete vesting of jurisdiction occurs in another court,<sup>49</sup> a moving party may waive its right to change of venue.<sup>50</sup> After the defendant Fair Board's motion for change of venue was granted, and the new county of venue was selected, the plaintiff's motion to vacate the change of venue was granted and the case proceeded to trial in the original county. The defendant Fair Board raised lack of jurisdiction on appeal. The court of appeals held that the defendant, by allowing the suit to proceed to trial in the original court without objection, had waived the right to change of venue and noted that waiver is especially applicable when the objection to resumption of full jurisdiction is made after the non-moving party has presented his case at trial.<sup>51</sup>

In *Glennar Mercury-Lincoln, Inc. v. Riley*,<sup>52</sup> the Second District Court of Appeals held that even though a change of venue is pending, a codefendant can voluntarily submit to the jurisdiction of the original court. This is an extension of the rule of *Indianapolis Dairymen's Co-Op v. Bottema*<sup>53</sup> in which the party moving for the change of venue voluntarily submitted to the original court's jurisdiction before perfecting the change of venue. In *Glennar Mercury-Lincoln*, the codefendant submitted to the jurisdiction of the court by filing a Trial Rule 60 motion to set aside a default judgment.

*State ex rel. Indianapolis-Marion County Building Authority v. Superior Court*<sup>54</sup> was an original action to compel the granting of a special judge, pursuant to Indiana Code section 34-5-1-1, to preside over a trial involving another judge's order that the city supply equipment and provide employee compensation. In response to the county judge's order for phone equipment, the building authority filed a petition for trial on the merits in the mandating judge's court to determine whether the equipment should be supplied. The building authority also filed a motion

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<sup>47</sup>*Id.* at 278 n.1 (Sullivan, J., dissenting).

<sup>48</sup>333 N.E.2d 104 (Ind. Ct. App. 1975).

<sup>49</sup>Vesting of jurisdiction in another court is not complete until the transcript and necessary filings are received in the office of the clerk of the change of venue court. See IND. R. TR. P. 78.

<sup>50</sup>333 N.E.2d at 114.

<sup>51</sup>*Id.*

<sup>52</sup>338 N.E.2d 670 (Ind. Ct. App. 1975).

<sup>53</sup>226 Ind. 260, 79 N.E.2d 409 (1948).

<sup>54</sup>344 N.E.2d 61 (Ind. 1976).

for change of judge. The judge set a hearing date, declared section 34-5-1-1 unconstitutional, viewed the building authority's action as a common law petition to modify, and set aside the order. The building authority then brought the original action in the supreme court to compel change of judge. Justice DeBruler, author of the opinion, held that the change of judge provision contained in section 34-5-1-1 "cannot constitutionally be invoked as a matter of right in cases . . . [where] substantial interference with a trial court's operation presently exists, requests for assistance have proven fruitless, and immediate remedial action by the trial court is necessary."<sup>55</sup> Justice DeBruler, analogizing the procedure to direct criminal contempt actions, stated that courts have the inherent power to order in emergency situations the removal of obstacles to the due administration of justice in their courts. The opinion stated in dictum, however, that change of judge should be granted when substantial capital improvements or salary increases are needed but can await a delayed decision by a special judge. The dissent by Justice Arterburn, joined by Chief Justice Givan, disputed the finding of an emergency situation.<sup>56</sup>

### B. *Pleadings and Pretrial Motions*

In *Brendanwood Neighborhood Association, Inc. v. Common Council*,<sup>57</sup> the issue was whether a plaintiff, after his complaint had been dismissed pursuant to Trial Rule 12(B) (6), could amend his complaint to add new plaintiffs as a matter of right. Trial Rule 12(B) (8) provides that when an action is dismissed under Trial Rule 12(B) (6) the plaintiff has a right to amend pursuant to Trial Rule 15(A) within ten days of the dismissal. The pleadings were amended within this time limit, but the trial court refused the amendment. The First District Court of Appeals, finding no relevant Indiana case law on the issue, relied on federal decisions<sup>58</sup> and the interrelationship of Trial Rules 12(B) (6), 15(A), and 17(A). The court concluded that since rule 17(A) requires the party of real interest to be named in order to avoid a dismissal under rule 12(B) (6), the liberal amendment pro-

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<sup>55</sup>*Id.* at 66.

<sup>56</sup>*Id.*

<sup>57</sup>338 N.E.2d 695 (Ind. Ct. App. 1975).

<sup>58</sup>*Halladay v. Verschoor*, 381 F.2d 100 (8th Cir. 1967); *Goldenberg v. World Wide Shippers & Movers*, 236 F.2d 198 (7th Cir. 1956); *Wood v. Rex-Noreco, Inc.*, 61 F.R.D. 669 (S.D.N.Y. 1973); *Joint School District No. One v. Brodd Constr. Co.*, 58 F.R.D. 213 (E.D. Wis. 1973); *Kroger Co. v. Adkins Transfer Co.*, 284 F. Supp. 371 (M.D. Tenn. 1968); *Kaminsky v. Abrams*, 41 F.R.D. 168 (S.D.N.Y. 1966); see also 6 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1474, at 378 (1969).

cedures of rule 15(A) should be applicable. Accordingly, the decision of the trial court was reversed and the case remanded with instructions to sustain the plaintiff's motion to add other plaintiffs.<sup>59</sup>

The Indiana Supreme Court, in a unanimous decision in *State ex rel. Young v. Noble Circuit Court*,<sup>60</sup> permitted amendment of pleadings to add defendants to the caption. The original petition for a vote recount was filed under the caption "*In Re*" without naming adversary parties. One adversary party filed a motion to dismiss, which was granted but reversed in effect when the plaintiff's motion to amend the caption was granted. The added defendant then filed a writ of prohibition in the supreme court to restrain the trial court from further action. The supreme court reasoned that the added defendant was on notice of the original action even though her name was not found in the caption. The particular rule applicable was Trial Rule 15(C) which makes the amendment proper and relates it back to the date of original filing, to overcome any statute of limitation issue.<sup>61</sup>

The trial court in *Chrysler Corp. v. Alumbaugh*<sup>62</sup> permitted amendment of the pleadings to substitute the proper defendant after the statutory period of limitations had passed. Chrysler Corp. was substituted for the original defendant, Chrysler Motor Corp., when the plaintiff learned from an answer to an interrogatory that the pickup truck involved in the strict liability action was manufactured by Chrysler Corp. The statute of limitations having expired, the amendment was permitted under Trial Rule 15(C) rather than under Trial Rule 25, "Substitution of Parties," because the proper defendant had prior notice, there was no prejudice to the defendant's defense on the merits, and the proper defendant knew or should have known that but for mistake he would have been summoned on time.<sup>63</sup>

Two cases during the survey period involved amendments to include affirmative defenses. On rehearing of *Huff v. Travelers Indemnity Co.*<sup>64</sup> the Third District Court of Appeals followed the general rule that amendments to pleadings should be freely made so as to bring all matters at issue before the court. At the trial

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<sup>59</sup>338 N.E.2d at 697-98.

<sup>60</sup>332 N.E.2d 99 (Ind. 1975).

<sup>61</sup>*Id.* at 103.

<sup>62</sup>342 N.E.2d 908 (Ind. Ct. App. 1976), also discussed in Vargo, *Products Liability, infra*.

<sup>63</sup>342 N.E.2d at 911-12. All such factors would be present in limited circumstances, primarily when parties are corporate entities, persons assuming aliases or changing their names, or where there is a family relationship between the originally named defendant and the substitute defendant.

<sup>64</sup>333 N.E.2d 786 (Ind. Ct. App. 1975).

court level, the defendant had filed a motion for summary judgment alleging an affirmative defense not raised in the pleadings. The plaintiff then filed a motion to strike the defendant's motion on the ground that the defense was waived by his failure to raise it in the answer. The defendant then filed a motion to amend the answer, and the trial court heard argument upon the summary judgment and the motion to amend the answer, as well as the plaintiff's response to each. The trial court allowed the amendment and denied the summary judgment. The appellate court affirmed, stating that even if the plaintiff had filed an affidavit stating the amendment would prejudice him, there was no error in allowing the amendment to the answer.<sup>65</sup>

In *Theye v. Bates*<sup>66</sup> the plaintiff, claiming that *in pari delicto* is an affirmative defense, argued that the defendant's failure to raise the defense in a responsive pleading or in an amended pleading resulted in the waiver of the defense. However, when *in pari delicto* evidence, which was a decisive factor in providing a reasonable basis for the judgment, was introduced at trial, the plaintiff failed to object.<sup>67</sup> The Second District Court of Appeals stated that appellate review of the status of *in pari delicto* as an affirmative defense was precluded, since the appellant's failure to object at trial meant that the issue was not preserved on appeal.

Trial Rule 76(2) provides for change of venue in any non-criminal action but puts a time limit of ten days on its exercise. The ten-day limit begins to run when the issues are *first* closed on the merits.<sup>68</sup> In *Rayburn v. Eisen*,<sup>69</sup> the First District Court of Appeals used policy reasons to support its conclusion that the issues in a multidefendant lawsuit are first closed on the merits when the *first* answer is filed. Judge Robertson, writing for the majority, supported the *Rayburn* holding with reasoning from *State ex rel. Yockey v. Superior Court*,<sup>70</sup> in which the Indiana Supreme Court examined the function of Trial Rule 76 and stated: "First [Trial Rule 76] is intended to guarantee a fair and impartial trial by making the automatic change of venue available.

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<sup>65</sup>*Id.* at 787.

<sup>66</sup>337 N.E.2d 837 (Ind. Ct. App. 1975).

<sup>67</sup>*Id.* at 844 n.6, citing *Ayr-Way Stores, Inc. v. Chitwood*, 261 Ind. 86, 91, 300 N.E.2d 335, 338 (1973).

<sup>68</sup>IND. R. TR. P. 76(2) provides:

In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for a change of judge or change of venue shall be filed not later than ten [10] days after the issues are first closed on the merits.

<sup>69</sup>336 N.E.2d 392 (Ind. Ct. App. 1975).

<sup>70</sup>307 N.E.2d 70 (Ind. 1974).

Second, the rule is designed to avoid protracted litigation by imposing a time limit after which a change of venue motion shall be denied.”<sup>71</sup> Judge Robertson saw both functions preserved in making the first answer the “time marker” for the ten-day rule.

The dissent by Judge Lybrook<sup>72</sup> would distinguish single defendant lawsuits from multiple defendant lawsuits. Where there is more than one defendant, making the first answer the “marker” would allow the second function of change of venue—avoiding protracted litigation—to predominate over the first—the fair and impartial trial. The defendant who fortuitously answered first would start the ten-day limit running for all defendants. This would to a certain extent destroy one of the basic tenets of the judicial system, a fair and impartial trial for all.<sup>73</sup>

In *Cherokee Drilling Corp. v. Gibson County Bank*,<sup>74</sup> a default judgment was entered against Cherokee for failure to appear or plead. Later, a cross-claim against Cherokee to foreclose a second mortgage was filed, to which Cherokee filed an answer and a motion for change of venue within the requisite ten-day period. The trial court denied the motion and was affirmed on appeal. The First District Court of Appeals held that the issues were first closed on the merits when the trial judge defaulted Cherokee for failure to answer the original complaint, and therefore the ten-day period for filing a motion for automatic change of venue began on the date of the default judgment.<sup>75</sup> The court's decision in *Cherokee* demonstrates that any party against whom a default is entered should file a change of venue motion within ten days, since additional claims may be filed against him in the same action after the entry of judgment.

In the case of *City of Fort Wayne v. State ex rel. Hoagland*<sup>76</sup> the plaintiff brought a restraint of trade action against the city and sought a preliminary injunction, a permanent injunction, and damages. The suit was filed on January 11, 1973, a hearing on the preliminary injunction was set for January 15, 1973, and the city filed an answer to the complaint on February 6, 1973. On February 16, 1973, the city moved for a change of venue from the county pursuant to Trial Rule 76(1). In response, the plaintiff filed a motion to strike the city's motion. The trial court sustained the plaintiff's motion and an appeal was perfected on that issue.

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<sup>71</sup>*Id.* at 71-72.

<sup>72</sup>336 N.E.2d at 394 (Lybrook, J., dissenting).

<sup>73</sup>*Id.*

<sup>74</sup>336 N.E.2d 685 (Ind. Ct. App. 1975).

<sup>75</sup>*Id.* at 687.

<sup>76</sup>342 N.E.2d 865 (Ind. Ct. App. 1976).



The Third District Court of Appeals held that the case was first closed on the merits when the answer to the complaint was filed on February 6 and thus the city's motion, filed on February 16, was timely. In making this determination the court rejected two novel arguments advanced by the plaintiff. The plaintiff's first theory was based on Trial Rule 76(3) which provides that the motion for change of venue must be filed within thirty days if a responsive pleading is not required. The plaintiff argued that since Trial Rule 65(A)(4)<sup>77</sup> does not require an answer for a preliminary injunction, the city had only thirty days to file and therefore the motion on February 16 was untimely. The court ruled that this argument may have validity in cases in which only a preliminary injunction is sought, but when a permanent injunction and damages are also at issue, responsive pleadings are required and the thirty-day provision of Trial Rule 76(3) is not applicable.<sup>78</sup>

The plaintiff's second argument involved an interpretation of Trial Rule 76(7), which provides generally that a party shall be deemed to have waived a change of venue if the case is set for trial before expiration of the time within which a party may ask for a change. The plaintiff contended that the city waived its right to a change of venue when the hearing on the preliminary injunction was set before the motion was filed. The court held that the hearing did not constitute a "trial"<sup>79</sup> so as to result in a waiver within the meaning of Trial Rule 76(7). Accordingly, the court of appeals reversed the trial court and remanded the case with instructions to grant the city's motion for change of venue.

In *City of Elkhart v. Middleton*<sup>80</sup> the Third District Court of

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<sup>77</sup>IND. R. TR. P. 65(A)(4) provides, in pertinent part: "Responsive pleadings shall not be required in response to any pleadings or motions relating to temporary restraining orders or preliminary injunctions."

<sup>78</sup>342 N.E.2d at 868, citing *McAllister v. Henderson*, 134 Ind. 453, 34 N.E. 221 (1893); 4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 386 (1971).

<sup>79</sup>*State ex rel. American Reclamation & Ref. Co. v. Klatte*, 256 Ind. 566, 270 N.E.2d 872 (1971) (function of preliminary injunction is to keep the status quo); *State ex rel. Hale v. Marion County Municipal Courts*, 234 Ind. 467, 127 N.E.2d 897 (1955) (the term trial contemplates final adjudication on the merits); *Public Serv. Comm'n v. Indianapolis Rys., Inc.*, 225 Ind. 30, 72 N.E.2d 434 (1947); *Tuf-Tread Corp. v. Kilborn*, 202 Ind. 154, 172 N.E. 353 (1930) (preliminary injunction does not determine the final merits); *Pence v. Garrison*, 93 Ind. 345 (1884) (hearings on application for temporary injunction are not trials).

In addition the appeal from a final judgment (trial) is under Trial Rule 59, filing a motion to correct errors, whereas appeal of a preliminary injunction is under Appellate Rule 4(B)(3), perfecting an interlocutory appeal.

<sup>80</sup>346 N.E.2d 274 (Ind. Ct. App. 1976).



Appeals considered third party practice under Trial Rule 14(A).<sup>61</sup> The suit was brought by a contractor against the city for payment on a contract for construction of a sewage treatment system and against an equipment supplier for misrepresentation. The city counterclaimed for damages allegedly caused by the defective system.

Two days after its answer, the city requested joinder of the estate of the city engineer who drew up the plans and specifications for the treatment facilities on the theory that, if the city should be required to pay the contractor on the contract, the engineer would be liable in tort for deficient plans and specifications. The estate objected because it had already filed suit against the city for compensation for furnishing the plans and specifications. The trial court denied the city's motion. The court of appeals, analogizing to federal court decisions<sup>62</sup> and relying on commentary by the Indiana Civil Code Study Commission,<sup>63</sup> determined that Trial Rule 14(A) was sufficiently broad to allow the joinder of the estate. However, since the trial court has discretion to refuse joinder, the court of appeals affirmed.

In what the court of appeals termed an "ingenious argument," the city then sought to apply Trial Rule 20(A)(2)<sup>64</sup> to force joinder of the estate. The court, stating that the city's argument "ignores the fundamental precept that our Rules of Civil Procedure are to be construed together and, if possible, harmoniously,"<sup>65</sup> held that joinder of parties pursuant to Trial Rule 20(A)(2) is within the discretion of the trial court.

### C. Pretrial Procedures and Discovery

*Farinelli v. Campagna*<sup>66</sup> illustrates the types of dilatory actions which may result in dismissal of a lawsuit. In this medical malpractice action, the defendant moved to dismiss because of the plaintiff's lack of prosecution, failure to comply with discovery requests, and failure to comply with a court order entered at the close of an incomplete pretrial conference. The Third District

<sup>61</sup>Trial Rule 14(A) provides that a defending party may bring in a third party if the third party may be liable to the defending party for all or part of the original plaintiff's claim against the defending party.

<sup>62</sup>346 N.E.2d at 277, citing *Jones v. Waterman S.S. Corp.* 155 F.2d 992 (3d Cir. 1945); *Aetna Cas. & Sur. Co. v. Kochenour*, 45 F.R.D. 248 (D. Pa. 1968); *Borden v. Bowles*, 35 F.R.D. 13 (D.D.C. 1964).

<sup>63</sup>2 W. HARVEY, INDIANA PRACTICE 81 (1970).

<sup>64</sup>Trial Rule 20(A)(2) provides for permissive joinder of parties where the right to relief arises out of one transaction and there are common questions of law or fact.

<sup>65</sup>346 N.E.2d at 279.

<sup>66</sup>338 N.E.2d 299 (Ind. Ct. App. 1975).

Court of Appeals discussed the inherent authority of a court to exercise administrative control over the conduct of the trial court's judicial business. However, the court found it unnecessary to base the dismissal upon that inherent power, because the power to dismiss was properly exercised in this instance pursuant to appropriate rules of civil procedure.

The court of appeals held that the provisions of Trial Rule 41(E) concerning the failure to prosecute civil actions or otherwise to comply with the rules of procedure, permit dismissal for a plaintiff's failure to comply with the trial rules or any court order.<sup>87</sup> The court also held that pursuant to Trial Rule 37(B)(4)<sup>88</sup> a trial court may enter a default judgment or a dismissal with prejudice against a party who fails to make discovery if the court determines that the conduct of a party has delayed or threatens to delay or obstruct the rights of another party. The court carefully distinguished Trial Rule 37(B)(2)(c), which permits a trial court to find that a party who resists or obstructs the action of another party in attempted discovery acted "in bad faith and abusively," from Trial Rule 37(B)(1), which permits a court to punish by contempt the same acts after a court has ordered a response to discovery. Pursuant to Trial Rule 37(B)(1), a finding that the court's order was in fact violated and that the violation resulted from unexcused conduct is sufficient to allow a court to order a dismissal.

Finally, the court discussed Trial Rule 16(K), which provides that if no appearance is made on behalf of a party at a pretrial conference without excuse or because of failure to give reasonable attention to the matter or if an attorney is grossly unprepared to participate in a pretrial conference, a trial court may "take such other action as may be appropriate" in addition to the remedies specifically allowed by the rule. Dismissal of the action is one of the "appropriate other actions."<sup>89</sup>

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<sup>87</sup>338 N.E.2d at 302. The court adopted the Civil Code Study Commission comment on Trial Rule 41(E): "Dismissal for failure of plaintiff to comply with these rules or any order of court will not change the existing Indiana law . . . ."

<sup>88</sup>IND. R. TR. P. 37(B)(4) provides:

The court may enter total or partial judgment by default or dismissal with prejudice against a party who is responsible under subdivision (B)(2) of this rule if the court determines that the party's conduct has or threatens to so delay or obstruct the rights of the opposing party that any other relief would be inadequate.

<sup>89</sup>"Such other action may include dismissal of the action under Rule 41(E) if plaintiff is at fault or the entry of a default judgment against a defendant pursuant to Rule 55(A)." *Id.* at 303, quoting from 2 W. HARVEY, INDIANA PRACTICE § 16.6, at 180 (1970).

In the case of *Clark County State Bank v. Bennett*<sup>90</sup> the defendant bank appealed from a default judgment entered against it. The plaintiffs had filed with the trial court consolidated motions for a default judgment for failure to respond to a request for discovery, for an order compelling discovery, and for allowance of attorney's fees. A hearing was scheduled and notice was given. After notice and prior to the entry of judgment by default, the defendant answered the complaint and filed responses to the plaintiffs' interrogatories and requests for admissions. However, despite this proliferation of paper, the trial court entered judgment by default.

On appeal, the bank argued that because a pleading or answer had been filed, the default judgment was incorrectly entered since Trial Rule 55(B) allows three days for an answer before the entry of a default judgment. The First District Court of Appeals held that the plaintiffs' entitlement to judgment by default was not rendered moot by the filing of the delinquent answer. In doing so, the court limited the holding in *Hiatt v. Yergin*<sup>91</sup> that the question of default is moot when a motion for default and delayed pleadings are filed on the same day. The trial court is vested with power to entertain the plaintiffs' application as well as with the discretion to enter the default judgment, even though the answer has been filed within the three-day period between notice and entry of judgment. Otherwise, the court of appeals stated, the three-day notice to the defaulting party would be converted into an opportunity to expand, almost without limitation, the time in which to answer the complaint.<sup>92</sup>

In affirming the award of attorney's fees pursuant to Trial Rule 37(B), the court construed the words "bad faith" in Trial Rule 37(B) (2) (c) to mean "failure to comply with a duty imposed under the specific rule" and held that there was no reason for the evasive or incomplete answer.<sup>93</sup> Hence, the trial court correctly used its discretion granted by Trial Rule 37(B) (2) to award the attorney's fees as the result of the bank's defective response to the plaintiffs' interrogatories.

Dilatory action may not always result in default or dismissal. In *State v. Dwenger*<sup>94</sup> the Second District Court of Appeals affirmed the trial court's holding that each party had waived the right to complain of the other's delay because each side had failed

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<sup>90</sup>336 N.E.2d 663 (Ind. Ct. App. 1975).

<sup>91</sup>152 Ind. App. 497, 284 N.E.2d 834 (1972).

<sup>92</sup>336 N.E.2d at 666-67.

<sup>93</sup>*Id.* at 668-69, citing 3 W. HARVEY, INDIANA PRACTICE § 37.1, at 125 (1970).

<sup>94</sup>341 N.E.2d 776 (Ind. Ct. App. 1976).

to file its complete witness list on time pursuant to a pretrial order. The witness lists in the negligence action were to be filed on Friday before the Monday trial, but both parties delivered only partial lists by the deadline. The state alleged that it had hand-delivered an additional list on Friday, but the plaintiff claimed to have received the list in Saturday's mail. The plaintiff mailed an additional list on Friday, which arrived at the state office on Monday and was delivered to the deputy attorney general after the first day of trial. The state contested the calling of an expert witness whose name first appeared on the delayed list. The trial court allowed the appearance after giving the defense thirty minutes to interview the witness.

In the case of *Shaw v. S. S. Kresge Co.*,<sup>95</sup> the plaintiff sued for wrongful discharge from employment. The trial court granted the defendant company's motion for summary judgment twenty days after the defendant had filed a request for admissions and before the plaintiff had responded. In rendering summary judgment, the trial court considered all questions in the unanswered request as admitted by the plaintiff. On appeal, the court looked to procedure rather than substance to decide whether the unanswered admissions could be deemed admitted in consideration of a motion for summary judgment. The Third District Court of Appeals held that when the party requesting admissions places no time limit for answering or objecting to the request, a reasonable time period should be allowed before the requests are deemed admissions. Because the thirty-day minimum time for response specifically provided in Trial Rule 36(A)<sup>96</sup> had not expired and a different time period was neither requested by the party nor granted by the judge, the court held that a reasonable time had not elapsed. Hence, the plaintiff's failure to respond to the request for admissions could not be deemed an admission of matters contained in the request.<sup>97</sup>

*Vlatos v. Indiana Bonding & Surety Co.*<sup>98</sup> involved the evidentiary effect of answers to interrogatories submitted by a litigant's attorney after insufficient consultation with his client. The litigant testified at trial that one answer was incorrect, and that his attorney in Philadelphia had been unable to confer with him at the time the answers were developed. He requested that his testimony concerning the accuracy of the answers to the interrogatories

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<sup>95</sup>328 N.E.2d 775 (Ind. Ct. App. 1975).

<sup>96</sup>Trial Rule 36(A) provides that a request for admissions must be objected to or answered within 30 days unless the party requesting admissions designates or the court allows a different period.

<sup>97</sup>328 N.E.2d at 779-80.

<sup>98</sup>333 N.E.2d 835 (Ind. Ct. App. 1975).

be accepted as undisputed at trial and that the answer to the interrogatory be regarded as being without probative value. The Third District Court of Appeals held that the interrogatory and the answer could be used at trial to the extent permitted by the rules of evidence.<sup>99</sup> The court of appeals disapproved of counsel's making or developing answers to interrogatories, although the court recognized that on occasion the practice may be virtually unavoidable. The court concluded that when the practice did occur and there was no claim that the answer was procured by fraud and connivance of the opposing party, the answer constituted the answer of the party on whose behalf it was made, and was properly admissible as an admission of that party.

#### *D. Trial and Judgment*

In the case of *Ragnar Benson, Inc. v. William P. Jungclaus Co.*,<sup>100</sup> the plaintiff sued several defendants for injuries sustained in an accident at a construction site. Defendant Benson filed a cross-claim against defendant Jungclaus. Thereafter each party moved for summary judgment, which the trial court denied. Jungclaus then filed a defense against Benson which alleged that the cross-claim was barred as a result of the doctrine of collateral estoppel. Specifically, Jungclaus stated that Benson's cross-claim had been decided on the merits when the claim had been dismissed and entered as a final judgment pursuant to a Trial Rule 12(B) (6) motion for failure to state a claim.

On appeal, the First District Court of Appeals stated that not all judgments of dismissal pursuant to Trial Rule (12) (B) constitute an adjudication on the merits so as to bar a subsequent determination of the issues. Among these exceptions are dismissal for want of jurisdiction or dismissal for want of a real party in interest. However, when a case is dismissed for failure to state a claim upon which relief can be granted there has been an adjudication on the merits and thus a subsequent assertion of the same claim is barred by the doctrine of collateral estoppel.<sup>101</sup>

*Brandon v. State*<sup>102</sup> was actually a criminal case involving a belated motion to correct errors. However, in the course of the opinion, the Indiana Supreme Court took the opportunity to delineate the analysis a trial court should utilize in ruling on a motion

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<sup>99</sup>*Id.* at 837.

<sup>100</sup>340 N.E.2d 361 (Ind. Ct. App. 1976).

<sup>101</sup>Collateral estoppel is also known as "estoppel by verdict or finding." *Town of Flora v. Indiana Service Corp.* 222 Ind. 253, 257, 53 N.E.2d 161, 163 (1944).

<sup>102</sup>340 N.E.2d 756 (Ind. 1976).

for summary judgment pursuant to Trial Rule 56.<sup>103</sup> The court stated that the trial judge should: (1) Identify the legal issues; (2) identify the nature of the material facts; (3) identify the material facts presented by the parties; (4) determine whether the material facts presented are in genuine issue, and if they are, deny summary judgment; (5) if the material facts presented are not in genuine issue, apply the law and grant or deny the summary judgment.<sup>104</sup>

In the case of *Sendak v. Allen*<sup>105</sup> two police officers brought an action for declaratory judgment<sup>106</sup> to test the validity of the Attorney General's Official Opinion No. 27, which interpreted Indiana Code section 18-1-11-9 to require that a policeman on active duty must resign his position before he may become a candidate for election to public office. The trial court entered summary judgment for the plaintiffs, and an appeal was perfected.

The First District Court of Appeals held that the suit was proper since the plaintiffs had established standing by demonstrating that their "rights, status and other legal relations would be directly affected by enforcement of the statutes in question."<sup>107</sup> The court then elaborated on the propriety of challenging a criminal statute by declaratory judgment, stating that such an attack is proper if the plaintiff's trade, business, or occupation is affected by statute. The court also noted that Trial Rule 57<sup>108</sup> expressly provides that a property right need not be involved to justify an action for declaratory judgment. However, the court did hold that such an action is not appropriate for a criminal defendant challenging the constitutionality of a statutory crime *malum in se*.

In the case of *Leinenbeck v. Dairymen, Inc.*,<sup>109</sup> the First District Court of Appeals considered the process by which a temporary restraining order may evolve into a permanent injunction pur-

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<sup>103</sup>Trial Rule 56 provides, in pertinent part, that:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits and testimony, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

<sup>104</sup>340 N.E.2d at 758.

<sup>105</sup>330 N.E.2d 333 (Ind. Ct. App. 1975).

<sup>106</sup>Declaratory Judgment Act, IND. CODE §§ 34-4-10-1 to -4 (Burns 1973).

<sup>107</sup>330 N.E.2d at 334, *citing* City of Mishawaka v. Mohny, 297 N.E.2d 858 (Ind. Ct. App. 1973).

<sup>108</sup>Trial Rule 57 generally provides for a declaratory judgment proceeding.

<sup>109</sup>333 N.E.2d 910 (Ind. Ct. App. 1975).

suant to Trial Rule 65(A) (2).<sup>110</sup> The plaintiff sought a temporary restraining order, a preliminary injunction, and a permanent injunction. The trial court granted the temporary restraining order and set a date for a hearing on the preliminary injunction. The hearing was held with both sides presenting evidence. Three days later the trial court entered judgment by making the temporary order a permanent injunction.

The issue presented at the appellate level was whether the trial court's action was proper under Trial Rule 65(A) (2). The court of appeals observed that although the trial rule provides for consolidation of the preliminary injunction hearing with a permanent injunction proceeding, the power to do so must be tempered with due process, fair notice, and an opportunity to be heard.<sup>111</sup> The court held that consolidation is not appropriate unless the parties receive clear and unambiguous notice at a time which will allow adequate opportunity to prepare for the pending litigation, and failure to give adequate notice is reversible error. Accordingly, the appellate court reversed the permanent injunction and remanded the case.

The Indiana Supreme Court in *In re Public Law No. 305 and Public Law No. 309*<sup>112</sup> resolved the issue of whether the new statute<sup>113</sup> requiring six-member juries in county court cases is constitutional. The court held the provision constitutional and overruled prior case law to the contrary.<sup>114</sup>

In *Van Horn v. City of Terre Haute*,<sup>115</sup> the First District Court of Appeals examined the scope of a trial court's de novo review of actions taken by a municipal board. The plaintiff Van Horn, a fireman, was dismissed after a hearing before the Board of Public Works and Safety of Terre Haute. Subsequently, he

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<sup>110</sup>Trial Rule 65(A) (2) provides, in pertinent part: "Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

<sup>111</sup>333 N.E.2d at 912, citing *Pughsley v. 3750 Lake Shore Drive Loop Bldg.*, 463 F.2d 1055 (7th Cir. 1975); *Eli Lilly & Co. v. Generik Drug Sales, Inc.*, 460 F.2d 1096 (5th Cir. 1972).

<sup>112</sup>334 N.E.2d 659 (Ind. 1975), also discussed in Marsh, *Constitutional Law, infra*. Other issues raised on appeal in this case are discussed in text accompanying notes 1-5 *supra*.

<sup>113</sup>IND. CODE § 33-10.5-7-6 (Burns Supp. 1976).

<sup>114</sup>334 N.E.2d at 662-63. The court relied upon the decision in *Williams v. Florida*, 399 U.S. 78 (1970), that the fourteenth amendment of the United States Constitution does not require 12-member juries.

The court overruled *Miller's Nat'l Ins. Co. v. American State Bank*, 206 Ind. 511, 190 N.E. 433 (1934), which held that 6-member juries violate IND. CONST. art. 1, § 20.

<sup>115</sup>346 N.E.2d 628 (Ind. Ct. App. 1976).



appealed the board's decision to the trial court, contending the board had made numerous errors and that he was therefore entitled to de novo review pursuant to Trial Rule 52. The complaint was summarily dismissed by the trial court.

Pursuing the matter to the appellate level, Van Horn argued that the trial court had erred by failing to hold the required trial de novo on the issues raised by the complaint and by failing to make findings of fact and conclusions of law as required by Trial Rule 52(A).<sup>116</sup>

The court of appeals held that Indiana Code section 18-1-11-3<sup>117</sup> provides for an appeal to the trial court by de novo review; but the review is applicable only to new legal issues or factual disputes, not to those which were presented to the administrative board.<sup>118</sup> In this case, Van Horn's complaint presented new issues and factual determinations; therefore de novo review and judicial findings of fact and law were required by Trial Rule 52.

The First District Court of Appeals opinion in *Hendrickson & Sons Motor Co. v. Osha*<sup>119</sup> focused on the effect of concurrent motions for judgment on the evidence as provided by Trial Rule 50.<sup>120</sup> Both the plaintiff and the defendant moved for judgment on the evidence after the jury's verdict but prior to the entry of judgment. The trial court granted a partial judgment for Osha and overruled Hendrickson's motion *in toto*.

On appeal, Osha argued that when a motion for judgment on the evidence is made by both parties in a jury trial, the result is a mutual waiver of trial by jury and a joint submission of the case on the merits to the court. The case of *Estes v. Hancock County Bank*<sup>121</sup> was cited as authority and found to be on point. However, the court of appeals observed that the Civil Code Study Commission did not intend for the "automatic withdrawal" rule to apply to Trial Rule 50<sup>122</sup> and held that, despite *Estes*, Indiana courts have never strictly adhered to the position that concurrent motions absolutely result in withdrawal of the case from the jury. The preferable rule of law is found in *Michigan Central Railroad*

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<sup>116</sup>Trial Rule 52 provides that the court shall make special findings of fact without request in any review of actions by an administrative agency.

<sup>117</sup>This section generally provides a discipline procedure for firemen and policemen.

<sup>118</sup>See generally *City of Mishawaka v. Stewart*, 261 Ind. 670, 310 N.E.2d 65 (1974).

<sup>119</sup>331 N.E.2d 743 (Ind. Ct. App. 1975).

<sup>120</sup>Trial Rule 50 provides that where the issues "are not supported by sufficient evidence or a verdict thereon is clearly erroneous . . . the court shall withdraw such issues from the jury and enter judgment thereon . . . ."

<sup>121</sup>259 Ind. 542, 289 N.E.2d 728 (1972).

<sup>122</sup>See 3 W. HARVEY, INDIANA PRACTICE 365 (1970).



*Corp. v. Spindler*<sup>123</sup> which declared that a case may be withdrawn from the jury after concurrent motions only where both parties acquiesce in the removal. However, where the parties do not contemplate withdrawal of the case from the jury, such action by the trial court is reversible error.

Trial Rule 50 was also discussed in *Geyer v. City of Logansport*,<sup>124</sup> in which the Second District Court of Appeals reviewed the standard for determining whether a motion for judgment on the evidence shall be granted. The case was a personal injury suit in which the trial court granted the defendant's motion for judgment at the close of all the evidence.

The court of appeals reversed, holding that the trial court can withdraw the issues from the jury and enter judgment pursuant to Trial Rule 50 only if there is no evidence, or no reasonable inferences to be drawn from the evidence, in favor of the party opposing the motion on any essential element of recovery. The evidence must be without conflict and susceptible of only one inference, which must be in favor of the moving party. The trial court must draw all rational inferences in favor of the party opposing the motion, and it may not substitute its judgment for that of the jury on questions of fact or grant the motion because the evidence preponderates in favor of the moving party.

In the case of *Burger v. National Brands, Inc.*<sup>125</sup> the Third District Court of Appeals discussed the distinction between the former Trial Rule 50 motion for a directed verdict and the current Trial Rule 50 motion for judgment on the evidence. The court stated that the former rule required the trial court to direct the jury to return a specific verdict, but the contemporary rule permits the judge to enter judgment without referral to the jury. Directing the jury to return a verdict is therefore now superfluous.

In *Redmond v. United Airlines, Inc.*,<sup>126</sup> the plaintiff brought suit against the defendant on a contract of guaranty. The trial was to the court; at the close of the plaintiff's case and prior to the defendant's presentation of evidence, the defendant made an oral motion for a finding in his favor pursuant to Trial Rule 41(B).<sup>127</sup>

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<sup>123</sup>211 Ind. 94, 5 N.E.2d 632 (1937); see also *State Security Life Ins. Co. v. Rinter*, 243 Ind. 331, 185 N.E.2d 527 (1962).

<sup>124</sup>346 N.E.2d 634 (Ind. Ct. App. 1976).

<sup>125</sup>342 N.E.2d 870 (Ind. Ct. App. 1976).

<sup>126</sup>332 N.E.2d 804 (Ind. Ct. App. 1975).

<sup>127</sup>Trial Rule 41(B) provides that:

After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that considering

Briefs were submitted and the trial court ruled for the plaintiff, thereby giving him a final judgment and recovery.

On appeal, the defendant argued that the trial court had denied him the opportunity to present evidence. The Second District Court of Appeals observed that the defendant's oral motion for dismissal pursuant to Trial Rule 41(B) was the correct procedure,<sup>128</sup> since a motion for judgment on the evidence is improper in a trial to the court.<sup>129</sup> However, the court held that there is no authority in the Indiana Trial Rules for finding for a plaintiff prior to the defendant's case-in-chief<sup>130</sup> and that the defendant's failure to make a timely request to present evidence after his motion was denied did not constitute a waiver of the right to present evidence.

In the case of *Building Systems, Inc. v. Rochester Metal Products, Inc.*<sup>131</sup> the Third District Court of Appeals distinguished Indiana's Trial Rule 41(B)<sup>132</sup> from Federal Rule of Civil Procedure 41(b),<sup>133</sup> both of which provide for an involuntary dismissal in a court trial, comparable to a judgment on the evidence in a jury trial. The court found that the Indiana rule requires the court to look only to the evidence and inferences most favorable to the nonmoving party to determine whether there is substantial evidence of probative value, but the federal rule permits the trial court to determine whether or not the party with the burden of proof has established the right to recovery by a preponderance of the evidence.<sup>134</sup> Thus, federal courts have more discretion in the determination of whether an involuntary dismissal shall be granted.

In the case of *Moe v. Koe*<sup>135</sup> the Second District Court of Appeals discussed the procedure for a motion for relief from final

all the evidence and reasonable inferences therefrom in favor of the party to whom the motion is directed, to be true, there is no substantial evidence of probative value to sustain the material allegations of the party against whom the motion is directed.

<sup>128</sup>332 N.E.2d at 806 n.2.

<sup>129</sup>*Id.* at n.4.

<sup>130</sup>*Id.* at n.3.

<sup>131</sup>340 N.E.2d 791 (Ind. Ct. App. 1976).

<sup>132</sup>See note 130 *supra*.

<sup>133</sup>FED. R. CIV. P. 41(b) provides:

After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

<sup>134</sup>340 N.E.2d at 793, *citing* Emerson Elec. Co. v. Farmer, 427 F.2d 1082 (5th Cir. 1970); 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2371, at 224 (1971).

<sup>135</sup>330 N.E.2d 761 (Ind. Ct. App. 1975).

judgment as provided by Trial Rule 60. The case involved a paternity action in which the defendant, representing himself, eventually suffered an adverse judgment. Thereafter he retained an attorney to perfect an appeal, but no action was taken for almost one year. Subsequently the defendant moved for relief from the former judgment. The trial court denied the motion.

On appeal, the denial was affirmed. The court of appeals observed that Trial Rule 60(B)(1),<sup>136</sup> which states the law as it has been in Indiana since 1881, requires the moving party to demonstrate that the judgment entered against him was the result of mistake, surprise, or excusable neglect. In addition to the trial rule's requirements, case law applicable to the rule demands that a meritorious defense to a claim must be asserted before the judgment may be set aside.<sup>137</sup>

In *Fitzgerald v. Brown*,<sup>138</sup> a personal injury case, the First District Court of Appeals discussed Trial Rule 60(B)(8). In 1971 the trial court entered a default judgment against the defendant. In 1973, after a hearing to determine damages, the plaintiff was awarded \$6,000 damages and costs. Later that year the defendant moved for relief from the 1971 judgment pursuant to Trial Rule 60(B)(8).<sup>139</sup> The motion was granted and the plaintiff appealed.

The court of appeals held that the motion for relief was proper since Trial Rule 60(B)(8) is not subject to the one-year limitation applicable to other provisions of Trial Rule 60 and that the sole requirement of the rule is that the motion be made within a reasonable time.

The appellate court explained that the motion is "a catch all provision allowing the court to vacate a judgment within the residual power of a court of equity to do justice."<sup>140</sup> The moving party in the court below testified that he did not receive service or have actual knowledge of the proceedings prior to entry of the default judgment. Although this would seem to be enough to qualify for the rule, case law indicates that the party seeking to avoid a judgment must also show that he has a meritorious de-

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<sup>136</sup>Trial Rule 60(B)(1) provides: "On motion and upon such terms as are just the court may relieve a party or his legal representative from a final judgment, order, default or proceeding for the following reasons:

(1) mistake, surprise, or excusable neglect;"

<sup>137</sup>330 N.E.2d at 764, citing *Cantwell v. Cantwell*, 237 Ind. 168, 143 N.E.2d 275 (1957), cert. denied, 356 U.S. 225 (1958).

<sup>138</sup>344 N.E.2d 309 (Ind. Ct. App. 1976).

<sup>139</sup>IND. R. TR. P. 60(B)(8) provides that: "the motion shall be made within a reasonable time, and for reasons (1), (2), (3) and (4) not more than one [1] year after the judgment, order or proceeding was entered or taken."

<sup>140</sup>344 N.E.2d at 311, citing 4 W. HARVEY, INDIANA PRACTICE § 60.17, at 215 (1971).

fense to the claim against him.<sup>141</sup> The defendant in this case alleged that there was a failure of the car brake system, which the appellate court held to be sufficient for relief from the judgment. Accordingly, the court of appeals affirmed the trial court decision.<sup>142</sup>

In *Green v. Karol*<sup>143</sup> the issue was what constituted "excusable neglect" in conjunction with a motion for relief from a final default judgment as provided by Rule 60(B)(1).<sup>144</sup>

The case involved an action by a buyer against a seller of unregistered securities in which the defendant defaulted because of "the press of business" and "the inadvertent loss" of the case file. The trial court entered a default judgment but later set it aside pursuant to Rule 60, and the plaintiff appealed.

The First District Court of Appeals held that the defaulted party has the burden of showing why a default would result in an injustice and why the inaction should be excused.<sup>145</sup> However, a default judgment is not favored and any doubt of its propriety must be resolved in favor of the defaulted party.<sup>146</sup> The court then considered (1) the substantial amount of money involved; (2) the material issues of fact accompanying the allegations of common law fraud and securities law violations; (3) the existence of a meritorious defense; (4) the apparent inadvertence of the delay; (5) the short length of delay; and (6) the lack of prejudice to the plaintiff caused by the delay. The court of appeals concluded that the trial court did not abuse its discretion in allowing the case to be heard on the merits, rejecting the plaintiff's argument that the "press of business" and the loss of the case file were negligent and inexcusable. The court explained that the trial court must exercise its discretion in light of all the circumstances of the case.

During the past year the appellate courts were again confronted with a plethora of litigation alleging error in instructions to the jury. Most of these appeals were routinely handled, but several merit discussion.

*Wickizer v. Medley*<sup>147</sup> was a personal injury case in which the plaintiff appealed the jury's award, contending that the trial court had erred in instructing the jury of the income tax consequences of a damage recovery. The Third District Court of Appeals

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<sup>141</sup>See *Moe v. Koe*, 330 N.E.2d 761 (Ind. Ct. App. 1975).

<sup>142</sup>Compare *id.*, discussed in text accompanying notes 138-140 *supra*.

<sup>143</sup>344 N.E.2d 106 (Ind. Ct. App. 1976).

<sup>144</sup>See note 139 *supra* for the text of Trial Rule 60(B)(1).

<sup>145</sup>See *Clark County State Bank v. Bennett*, 336 N.E.2d 663 (Ind. Ct. App. 1975).

<sup>146</sup>See *Indiana Travelers' Accident Ass'n v. Doherty*, 70 Ind. App. 214, 123 N.E. 242 (1919).

<sup>147</sup>348 N.E.2d 96 (Ind. Ct. App. 1976).

held that the instruction was improper<sup>148</sup> but did not amount to reversible error since it could not be concluded that the jurors had been misled as to the law of the case.<sup>149</sup> The court observed that the challenged instruction served to warn the jury to base its award on the evidence rather than on speculation about tax consequences.

In the case of *Chrysler Corp. v. Alumbaugh*<sup>150</sup> the appellate court again addressed the issue of jury instructions. The trial court gave an instruction which generally stated that failure of a party to call a witness presumably favorable to that party gives rise to an inference that the witness's testimony would actually be unfavorable to that party. The court of appeals stated that such an instruction may be appropriate when the facts in evidence uniquely require the instruction, but casual acceptance of such instructions is not approved. After further examination of the record and the total circumstances of the case, the the court concluded that the improper instruction did not constitute harmful error.

During the past year, there were a number of developments in the area of assessment of attorney fees and court costs in both federal and state courts. In *Satoskar v. Indiana Real Estate Commission*<sup>151</sup> the Seventh Circuit Court of Appeals affirmed the district court's denial of attorney's fees to the plaintiff. The suit for injunctive relief successfully challenged the Indiana statute precluding aliens from applying for or obtaining a real estate license.<sup>152</sup> On appeal the plaintiff conceded that a prevailing party is not ordinarily entitled to a recovery of attorney's fees but contended that the case came within any one of four judicially recognized exceptions to that rule. Specifically, the plaintiff asserted that attorney's fees should be granted because: (1) By securing injunctive and declaratory relief he has conferred a common benefit on a group of people whose constitutional rights had been violated; (2) he has acted as a private attorney general in effectuating a strong congressional policy; (3) the court has inherent power to shift the attorney's fees to defeated defendants in section 1983<sup>153</sup>

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<sup>148</sup>See also *Highshew v. Kushto*, 235 Ind. 505, 134 N.E.2d 555 (1956).

<sup>149</sup>This is the test to determine whether an erroneous instruction constitutes reversible error. See *Drolet v. Pennsylvania R.R. Co.*, 130 Ind. App. 544, 555, 164 N.E.2d 555, 558 (1960).

<sup>150</sup>342 N.E.2d 908 (Ind. Ct. App. 1976).

<sup>151</sup>517 F.2d 696 (7th Cir. 1975). This case and others discussed in this section are discussed in Note, *The Taxation of Costs in Indiana Courts*, 9 IND. L. REV. 679 (1976).

<sup>152</sup>IND. CODE § 25-34-1-12(2) (Burns 1974).

<sup>153</sup>42 U.S.C. § 1983 (1970).

actions; and (4) the defendants had acted in bad faith by pursuing frivolous appeals.

The court of appeals rejected the plaintiff's argument for all four exceptions. The court observed that the United States Supreme Court's decision in *Alyeska Pipeline Service Co. v. Wilderness Society*<sup>154</sup> was largely controlling. In that case, the Court held that in the absence of statutory authority the federal courts have no authority to grant attorney's fees based on the private attorney general approach or on the courts' views of the social importance of the issues involved in the case. The court of appeals concluded that the *Alyeska* case was fatal to the plaintiff's second and third arguments.

The court went on to note that the "common fund and benefit" theory of the first exception urged by the plaintiff was not applicable in this case, since that exception to the general rule is recognized only where there is an identifiable class of persons to whom the benefits of the litigation may be traced and to whom the costs of the litigation may be assessed. The court found that there was no such class involved in this case. The court also rejected the plaintiff's argument that the appeals had been taken in bad faith.

In *Palace Pharmacy, Inc. v. Gardner & Guidone, Inc.*,<sup>155</sup> the plaintiff was granted a preliminary injunction against the defendant after posting bond. The trial court's subsequent granting of a permanent injunction was reversed, however, and the injunction was dissolved. Thereafter the defendant filed a motion with the trial court to assess damages on the plaintiff's bond, including attorney's fees incurred in resisting the injunction.

The First District Court of Appeals agreed with the plaintiff that attorney's fees are not recoverable in the absence of statutory authority. However, the court ruled that in a successful action for dissolution of an injunction attorney's fees are a proper element of recovery under the authority of Trial Rule 65(C).<sup>156</sup>

In the case of *Popeil Brothers, Inc. v. Schick Electric, Inc.*,<sup>157</sup> the Seventh Circuit Court of Appeals discussed the question of whether a prevailing party is entitled to costs pursuant to Federal Rule 54(d).<sup>158</sup> The action was a patent infringement case in which

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<sup>154</sup>421 U.S. 240 (1975).

<sup>155</sup>329 N.E.2d 642 (Ind. Ct. App. 1975).

<sup>156</sup>Trial Rule 65(C) provides for damages and costs incurred for a wrongfully enjoined party.

<sup>157</sup>516 F.2d 772 (7th Cir. 1975).

<sup>158</sup>FED. R. CIV. P. 54(d) provides, in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."

an appeal was originally taken to the Seventh Circuit. Upon remand the clerk of the trial court assessed costs against the plaintiff in excess of \$13,000. Thereafter the defendants moved for an order pursuant to Federal Rule 37(c) to charge to the plaintiff additional expenses, including attorney fees, amounting to more than \$16,000, incurred in the taking of a deposition in Japan. The defendants claimed the deposition expenses were caused by the plaintiff's failure to admit.<sup>159</sup> The plaintiff moved the court to set aside the taxed costs and also to deny the deposition expenses. The district court granted the plaintiff's motion and an appeal followed.

In discussing Federal Rule 54(d), the court of appeals held that even in situations where the parties in good faith bring and defend a lawsuit, the prevailing party is *prima facie* entitled to costs and it is incumbent on the losing party to overcome that presumption. Therefore unless the losing party can show some degree of fault on the part of the prevailing party which would merit a penalty, costs will be taxed against the loser, even if the judgment is silent as to costs. Federal Rule 54 provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." The court noted that although the language of the rule vests some discretion in the trial court, that discretion "is not unfettered, however, or the earlier language [of the rule] would be rendered meaningless."<sup>160</sup> The court of appeals held that in this case the district court's denial of costs was an abuse of discretion and reversed.

However, the court of appeals reached a different conclusion regarding the \$16,000 expenses for the Japan deposition. The court observed that the Supreme Court has held that whether or not to apply the old "100 mile rule," denying expenses incurred beyond a 100-mile zone, is a question for the trial court's discretion.<sup>161</sup> Furthermore, Rule 37(c) lacks the "shall be allowed as of course" language and the presumption of taxation of costs provided by Federal Rule 54. Accordingly, the court refused to reverse the lower court's denial of the deposition expenses.

In the case of *Calhoun v. Hammond*,<sup>162</sup> the trial court permitted the successful party to recover an expert witness fee of \$200, three individual witness fees of \$20 each, a filing fee of \$26, and compensation of \$25 for the transcription of a deposition. The issue on appeal was whether the expenses other than the filing fee

<sup>159</sup>FED. R. CIV. P. 37(c) permits the court to order the payment of "reasonable" expenses, including "reasonable" attorney's fees, incurred in making proof of matters the opposing party has failed to admit.

<sup>160</sup>516 F.2d at 774.

<sup>161</sup>*Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964).

<sup>162</sup>345 N.E.2d 859 (Ind. Ct. App. 1976).



could be taxed as costs. The relevant rule, Trial Rule 54(D), provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ."<sup>163</sup>

The Third District Court of Appeals held that witness fees should be included in costs assessed, but not in excess of the amounts allowed by two statutes which prescribe the same per diem and mileage allowance for both lay and expert witnesses.<sup>164</sup> The court also stated without discussion that there is no Indiana authority permitting the taxation as costs of expenses incurred in the transcription of depositions.<sup>165</sup>

### *E. Appeals*

In the case of *Citizens National Bank v. Harvey*<sup>166</sup> the Second District Court of Appeals took the opportunity to describe the anatomy of an appeal. The court stated that the essential elements of an appeal are the judgment,<sup>167</sup> the motion to correct errors,<sup>168</sup> the brief,<sup>169</sup> and the record.<sup>170</sup> The appeal is taken from the judgment. The motion to correct errors serves as a complaint for the appellate action. The brief, which must contain a verbatim copy of the judgment, raises the issues of the alleged errors. The record provides an alternative source of information to cover the brief's deficiencies.

In the case of *Logal v. Cruse*<sup>171</sup> the Indiana Supreme Court examined the relationship between trial court jurisdiction and appellate review. The trial court dismissed the suit for failure to comply with orders, and an appeal was perfected on the dismissal. Subsequently, new counsel filed a petition to reinstate the action pursuant to Trial Rule 60(B). The petition was denied and another appeal was perfected on that issue.

The supreme court held that when the appeal was filed on the original judgment of dismissal, the trial court lost its general jurisdiction over the case. Therefore, the purported proceeding

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<sup>163</sup>IND. R. TR. P. 54(D) provides, in pertinent part: "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs in accordance with any provision of law."

<sup>164</sup>IND. CODE § 5-7-9-4 (Burns Supp. 1976) (lay witnesses); *id.* § 34-1-14-12 (Burns 1973).

<sup>165</sup>345 N.E.2d at 863. *But see* Note, *The Taxation of Costs in Indiana Courts*, 9 IND. L. REV. 679, 687-88 (1976).

<sup>166</sup>334 N.E.2d 719 (Ind. Ct. App. 1975).

<sup>167</sup>IND. R. TR. P. 54.

<sup>168</sup>IND. R. TR. P. 59.

<sup>169</sup>IND. R. APP. P. 8.1, 8.2, 8.3, 8.4.

<sup>170</sup>IND. R. APP. P. 7.1, 7.2, 7.3.

<sup>171</sup>338 N.E.2d 309 (Ind. 1976).



pursuant to Rule 60(B) was a nullity and the appeal from that proceeding was dismissed.

During the past year the appellate courts were again confronted with a number of appeals involving defective filing. In the case of *Indianapolis Machinery Co. v. Bollman*,<sup>172</sup> cross-claimant Letzer filed a motion to correct errors by ordinary mail. The motion was mailed on the last day of the sixty-day limit provided by Trial Rule 59.<sup>173</sup> However, the motion was not received or entered into the record until after the statutory time limit had elapsed. The First District Court of Appeals ruled that Trial Rule 5(E)<sup>174</sup> was controlling. The rule provides that a motion will be deemed filed on the day it is mailed if it is sent by registered or certified mail. Unfortunately, in this case the motion was sent by ordinary mail and was therefore not considered to be filed until it was actually received. Accordingly, the court held that the lower court had erred in granting a motion for an entry nunc pro tunc and as a result the appellate court had no jurisdiction.<sup>175</sup>

In *State ex rel. Dillon v. Shepp*,<sup>176</sup> the plaintiff appealed from a judgment entered for the defendant. Thereafter the plaintiff, in the course of the appeal, neglected to serve certain defendants with a copy of a petition to extend the time to file a transcript or a petition for extension of time to file the appellate brief or the brief itself, as required by Appellate Rules 2(B)<sup>177</sup> and 12(B).<sup>178</sup>

The First District Court of Appeals observed that the unserved defendants were parties in the trial court complaint and therefore of record on appeal.<sup>179</sup> Thus, they were entitled to service of all copies of all papers filed on the appeal. The court concluded that the law in Indiana is clear that a failure to comply with the requirements for service of all parties will result in the dismissal of the appeal. Consequently, the appeal was dismissed.

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<sup>172</sup>339 N.E.2d 612 (Ind. Ct. App. 1976).

<sup>173</sup>Trial Rule 59 provides that a "motion to correct errors shall be filed not later than sixty [60] days after the entry of judgment."

<sup>174</sup>Trial Rule 5(E) provides, in part, that "[f]iling by registered or certified mail shall be complete upon mailing."

<sup>175</sup>IND. R. TR. P. 59(G) provides that an appellate court may consider issues which could be raised in a motion to correct errors only when the issues have actually been included in the motion to correct errors.

<sup>176</sup>332 N.E.2d 815 (Ind. Ct. App. 1975).

<sup>177</sup>Appellate Rule 2(B) provides that all parties of record in trial are parties on appeal.

<sup>178</sup>Appellate Rule 12(B) provides in part:

Copies of all papers filed by any party shall, at or before the time of filing, be served by a party or a person acting for him on all other parties to the appeal or review. Service on a party represented by counsel shall be made on counsel.

<sup>179</sup>IND. R. APP. P. 2(B).

The determination of when an order is appealable is often a crucial issue in appellate litigation. Several decisions in the last year have given new insight into the area. *Swanson v. American Consumer Industries, Inc.*<sup>180</sup> was a federal derivative class action suit brought by the minority shareholders. On the second appeal, the trial court was again reversed and the case remanded with a mandate to the trial court to enter judgment for the plaintiff and to assess costs and attorney's fees against the defendant. Final judgment was entered in September 1973. In April 1974, the district court awarded attorney's fees in excess of \$21,000 to the plaintiff. Thereafter the plaintiff appealed, challenging both the 1973 judgment and the amount of attorney's fees allowed in the 1974 proceeding.

At the appellate level again, the defendant argued that the plaintiff's appeal from the 1973 judgment should be dismissed because the appeal was not filed within thirty days of the 1973 entry.<sup>181</sup> The court of appeals held that the 1973 judgment was final and that the reservation of the issue of attorney's fees until 1974 had no effect on the appealability of that judgment. The court noted that the issue of attorney's fees is collateral or incidental to the merits of the case and therefore directly appealable under 28 U.S.C. § 1291.<sup>182</sup> Accordingly, the court dismissed the plaintiff's untimely appeal from the 1973 judgment but reviewed the district court's 1974 award.<sup>183</sup>

In *Stanray Corp. v. Horizon Construction, Inc.*,<sup>184</sup> the Second District Court of Appeals dealt with the issue of when a summary judgment pursuant to Trial Rule 56(C)<sup>185</sup> becomes a final appealable judgment as provided by Trial Rule 54(B).<sup>186</sup>

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<sup>180</sup>517 F.2d 555 (7th Cir. 1975).

<sup>181</sup>Appellate Rule 4(A) provides in part that notice of appeal shall be filed within "30 days of the date of the entry of the judgment or order appealed from."

<sup>182</sup>28 U.S.C. § 1291 (1970) provides, in part: "The court of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

<sup>183</sup>517 F.2d at 561, citing 6 J. MOORE, FEDERAL PRACTICE § 54.31, at 471-72 (2d ed. 1974).

<sup>184</sup>342 N.E.2d 645 (Ind. Ct. App. 1976).

<sup>185</sup>IND. R. TR. P. 56(C) provides in part:

A summary judgment upon less than all the issues involved in a claim or with respect to less than all the claims or parties shall be interlocutory unless the court in writing expressly determines that there is no just reason for delay and in writing expressly directs entry of judgment as to less than all the issues, claims or parties. The court shall designate the issues or claims upon which it finds no genuine issue as to any material facts.

<sup>186</sup>IND. R. TR. P. 54(B) provides, in part:

[T]he court may direct the entry of a final judgment as to one or

The plaintiff Stanray was one of several parties seeking foreclosure upon the defendant's property. In April 1973, the trial court granted summary judgment for the plaintiffs against the defendant. In November 1974, the trial court determined that another creditor's mortgage lien took priority over all of the original plaintiffs' claims and that Stanray's lien was not timely filed.

On appeal, Stanray contended that the 1974 entry was contrary to the 1973 judgment, which was a final determination of the plaintiffs' interest under the lien. The court of appeals rejected Stanray's argument and gave an in-depth explanation of Trial Rules 54(B) and 56(C). The court held that these rules provide that a summary judgment made upon less than all the issues involved in a claim shall be regarded as interlocutory unless the trial court expressly determines in writing that there is no just reason for delay and thereafter directs the judgment to be entered. The court ruled that since no such express determination was made in this case the 1973 judgment was only tentative and therefore subject to a subsequent final revision.

*State v. Collier*<sup>187</sup> was a 1968 personal injury suit brought against the State of Indiana. The trial court sustained the defendant's demurrer to the plaintiff's original complaint, but no appeal was taken at that time. In 1970 the trial court granted the plaintiff's motion to reconsider the matter.

The question raised on the defendant's appeal was whether the 1968 entry was a final judgment from which an appeal could have been taken. The record indicated that the ruling on the demurrer was entered on the docket sheet but not in the order book. The First District Court of Appeals found that the docket sheet entry was merely a finding and not a final judgment. Citing numerous Indiana statutes, cases and trial rules, the court held that a finding cannot be a final judgment until the trial judge intentionally declares it to be so. Since there was no evidence of this intention, the court of appeals affirmed the lower court's decision.

The past year also brought the usual large number of appeals dealing with Trial Rule 59. The rule generally prescribes the procedure for filing a motion to correct errors, which is a prerequisite to any appeal.

In *Hendrickson & Sons Motor Co. v. Osha*<sup>188</sup> the appeal was attacked on the grounds that the motion to correct errors and the

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more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

<sup>187</sup>331 N.E.2d 784 (Ind. Ct. App. 1975).

<sup>188</sup>331 N.E.2d 743 (Ind. Ct. App. 1975).

memorandum in support thereof lacked the requisite specificity<sup>189</sup> to preserve any of the issues for the appellate court. The First District Court of Appeals held that the alleged error must be stated in specific terms and must be accompanied by a statement of the facts and grounds upon which the error is based. However, in determining the requisite specificity, the motion will be read together with its supporting memorandum. The court noted that although the motion at issue in *Hendrickson* was cast in general terms, the supporting memorandum contained a statement of the facts and grounds sufficient to comply with the specificity requirements of Trial Rule 59(B).

In *City of Indianapolis v. Nickel*,<sup>190</sup> a group of property owners filed a complaint for review in superior court after the Board of Sanitary Commissioners had assessed sewer construction costs against them. The trial court reduced the assessment and the city filed a motion to correct errors and perfected an appeal.

One of the issues raised on appeal was whether or not the city was required to file a petition for rehearing within fifteen days after the trial court's decision as provided by Indiana Code section 18-5-15-6. The Second District Court of Appeals held that Trial Rule 59 supersedes those unrepealed statutes which provide other procedures for taking an appeal from a final judgment. Hence, Trial Rule 59 is the only mechanism by which an appeal can be taken to a higher court.

During the past year the appellate courts again handed down a number of opinions holding that an appeal cannot be perfected unless a separate additional motion to correct errors is filed for every change in the original judgment.<sup>191</sup>

In the case of *Lake County Title Co. v. Root Enterprises, Inc.*<sup>192</sup> the trial court in determining the defendant's motion to correct errors, reduced a judgment of approximately \$20,000 to \$15,000. The defendant filed a second motion to correct errors addressed to the judgment on the prior motion. On appeal, the question was whether the second motion to correct errors was necessary. The Third District Court of Appeals observed that "any amendment of a judgment creates a new judgment which requires a motion to

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<sup>189</sup>IND. R. TR. P. 59(B) provides, in part, that: "The statement of claimed errors shall be specific rather than general, and shall be accompanied by a statement of the facts and grounds upon which the errors are based."

<sup>190</sup>331 N.E.2d 760 (Ind. Ct. App. 1975). For a discussion of the other issues in this case, see Shaffer, *Administrative Law*, *supra*.

<sup>191</sup>The leading case on this matter appears to be *State v. Deprez*, 260 Ind. 413, 296 N.E.2d 120 (1973); *see also* *Davis v. Davis*, 306 N.E.2d 377 (Ind. Ct. App. 1974). *See generally*, Harvey, 1975 *Survey*, *supra* note 18, at 94.

<sup>192</sup>339 N.E.2d 103 (Ind. Ct. App. 1976).

correct errors."<sup>193</sup> In the instant case the original judgment had been altered and therefore the second motion was necessary and proper.

In *Minnette v. Lloyd*,<sup>194</sup> the plaintiff sought injunctive relief against the Board of Public Safety of the City of Evansville and the defendant counterclaimed for declaratory judgment. The trial court entered an original judgment against both parties on their respective claims, and each party filed a motion to correct errors. Three months later the trial court corrected the judgment and found for the plaintiff. Without filing another motion to correct errors, the plaintiff initiated an appeal. The court of appeals held that without the second motion there could be no appellate jurisdiction to entertain the plaintiff's appeal. Consequently, the appeal was dismissed.

In *Miller v. Mansfield*<sup>195</sup> the plaintiff filed a motion to correct errors which was granted in part and denied in part. Specifically, a new trial was granted and the verdict of the jury was set aside. The defendant took an appeal. The issue on appeal was whether the defendant was required to file a motion to correct errors to bring the appellate action. The Third District Court of Appeals ruled that the motion was necessary under the Indiana Supreme Court's interpretation<sup>196</sup> of Appellate Rule 4(A).<sup>197</sup> Accordingly, the appeal was dismissed over Judge Garrard's dissent that the order for a new trial was a final judgment and that the purpose for the motion to correct errors did not exist.<sup>198</sup>

The defendant in *State ex rel. Murray v. Estate of Heith-ecker*<sup>199</sup> attacked the plaintiff's appeal on the grounds that the personal representative, who was a party at trial, was not named as a party in the motion to correct errors. In support of the argument for dismissal the defendant cited several cases<sup>200</sup> which were decided under the former Supreme Court Rule 2-6.<sup>201</sup>

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<sup>193</sup>*Id.* at 108.

<sup>194</sup>333 N.E.2d 791 (Ind. Ct. App. 1975).

<sup>195</sup>330 N.E.2d 113 (Ind. Ct. App. 1975).

<sup>196</sup>See case cited at note 173 *supra*.

<sup>197</sup>IND. R. APP. P. 4(A) provides:

Appeals may be taken by either party from all final judgments of Circuit, Superior, Probate, Criminal, Juvenile, County, and where provided by statute for Municipal Courts. A ruling or order by the trial court granting or denying a motion to correct errors shall be deemed a final judgment, and an appeal may be taken therefrom.

<sup>198</sup>330 N.E.2d at 115 (Garrard, J., dissenting).

<sup>199</sup>333 N.E.2d 308 (Ind. Ct. App. 1975).

<sup>200</sup>*Id.* at 309 & nn.1 & 2.

<sup>201</sup>"In the title to the assignment of errors all parties to the judgment seeking relief by the appeal shall be named as appellants, and all parties to the judgment whose interests are adverse to the interests of the appellants

The First District Court of Appeals held that the Supreme Court Rules are no longer the law in Indiana. The present state of the law is contained in Appellate Rule 2(B)<sup>202</sup> which provides that all parties of record at trial are parties to the appeal, regardless of whether the motion to correct errors names them as such.

In the case of *Haverstick v. Banat*<sup>203</sup> a jury verdict was entered as final judgment on June 25, 1973 and a praecipe for the record of the proceedings was filed on June 28, 1973. Five days later a motion to correct errors was filed and subsequently overruled.

The issue before the First District Court of Appeals was whether the procedural irregularity of filing the praecipe before the motion to correct errors was fatal to the court's appellate jurisdiction. The court held that Appellate Rule 2(A)<sup>204</sup> provides that the motion should precede the praecipe. However, the court noted that the essential purpose of Rule 2(A) is to hasten the submission of appeals. The court therefore concluded that the procedural defect in this case should not preclude appellate jurisdiction unless the substantial rights of a party had been adversely affected. Finding that the parties were not prejudiced the court denied the motion to dismiss.

In *Scott Paper Co. v. Public Service Commission*<sup>205</sup> an appeal was taken to the Second District Court of Appeals from a final ruling by the Public Service Commission. A petition for rehearing was filed with the Commission and a record of the proceedings was filed with the court. The record of the proceedings did not contain an assignment of error.

The court of appeals, considering the Commission's motion to dismiss, observed that Indiana Code section 8-1-3-1<sup>206</sup> requires the appealing party to file an assignment of error and Appellate Rule 7.2<sup>207</sup> further requires that the assignment be contained in

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shall be named as appellees . . . ." IND. S. Ct. R. 2-6, *reprinted in* 3 D. FLANAGAN, F. WILTROUT, & F. HAMILTON, *INDIANA TRIAL AND APPELLATE PRACTICE* § 2402, at 169 (1952).

<sup>202</sup>See note 179 *supra*.

<sup>203</sup>331 N.E.2d 791 (Ind. Ct. App. 1975).

<sup>204</sup>IND. R. APP. P. provides:

An appeal is initiated by filing with the clerk of the trial court a praecipe designating what is to be included in the record of the proceedings, and that said praecipe shall be filed within thirty [30] days after the court's ruling on the Motion to Correct Errors or the right to appeal will be forfeited. A copy of such praecipe shall be served promptly on the opposing parties.

<sup>205</sup>330 N.E.2d 137 (Ind. Ct. App. 1975).

<sup>206</sup>IND. CODE § 8-1-3-1 (Burns 1973) authorizes the appeal from the Commission.

<sup>207</sup>Appellate Rule 7.2 provides that the record of the proceedings shall consist of a certified copy of the motion to correct errors or an assignment

the record of the proceeding. Hence a separate, belated assignment of error would not be permissible. With much regret the court was forced to conclude that there was no jurisdiction to entertain the appeal.

The Indiana Supreme Court in *In re Estate of Fanning*<sup>208</sup> accepted a petition for transfer even though the court was aware that the petition for transfer failed to raise any of the grounds required by Appellate Rule 11(B)(2).<sup>209</sup> The court found that the issue presented in the case, in view of the conflicting case law, was of such public concern that the requirements of the rule should not be strictly applied.

In *Skendzel v. Marshall*<sup>210</sup> the plaintiff filed a petition for writ of mandate in the supreme court seeking an order to force compliance with the court's previous order on remand. In the petition the plaintiff alleged that the entry of the trial court on remand was inadequate and inconsistent with the supreme court's original remand order.

In examining the plaintiff's argument, the supreme court stated that when an appellate court remands with instructions for further proceedings the appellate court retains jurisdiction to see that the instructions are followed. Therefore, if the trial court fails to comply with the instructions the aggrieved party may promptly seek a writ of mandate to enforce compliance. The court observed that when such a procedure is taken, the function of the appellate court is to compare the action ordered on remand with the action taken by the trial court and thereby ascertain whether compliance has been achieved.

In this particular case, the supreme court found that the action ordered and the action taken were consistent and therefore denied the petition for writ of mandate.

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of errors. The leading case interpreting this rule is *Moore v. Spann*, 298 N.E.2d 490 (Ind. Ct. App. 1973).

<sup>208</sup>333 N.E.2d 80 (Ind. 1975). For a discussion of this case, see *Property, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 294 (1975).

<sup>209</sup>IND. R. APP. P. 11(B)(2) provides a lengthy description of the procedure for transfer of a case from the court of appeals to the supreme court.

<sup>210</sup>330 N.E.2d 747 (Ind. 1975). For a discussion of prior proceedings in this case, see *Bepko, Contracts and Commercial Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 116, 117-19 (1974).

## V. Constitutional Law

William E. Marsh\*

### A. Federalism

Indiana was a party in two recent cases, *National League of Cities v. Usery*<sup>1</sup> and *Brennan v. Indiana*,<sup>2</sup> challenging 1974 amendments to the Fair Labor Standards Act (FLSA).<sup>3</sup> The FLSA, originally enacted in 1938, establishes minimum wage and maximum hour protections for employees in the private sector. These employee benefits were extended to most public employees by the 1974 amendments. Indiana challenged the constitutionality of application of minimum wage and maximum hour provisions to state employees as a party plaintiff in *National League of Cities v. Usery*, in the United States District Court for the District of Columbia.<sup>4</sup> In *Brennan v. Indiana*,<sup>5</sup> the state was defendant in actions brought by the Secretary of Labor in the United States District Court for the Southern District of Indiana to enforce the FLSA. Both district courts and the Seventh Circuit, on appeal in *Brennan*,<sup>6</sup> upheld the 1974 FLSA amendments on the basis of *Maryland v. Wirtz*.<sup>7</sup> When *National League of Cities v. Usery* came before the United States Supreme Court, the Court overruled *Wirtz* and held the 1974 FLSA amendments unconstitutional.

Mr. Justice Rehnquist wrote the opinion for the Court. The decision is not the most widely heralded case decided by the Court in the 1975 term, but in the long run it may be the most significant. Given its narrowest reading, this is one of the most significant federalism decisions of the Court since 1937. Potentially, if the broad ramifications of the decision suggested by Mr. Justice Brennan in his dissent come to pass, the case may someday be

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<sup>1</sup>96 S. Ct. 2465 (1976).

<sup>2</sup>517 F.2d 1179 (7th Cir. 1975), *vacated sub nom.* *Indiana v. Usery*, 96 S. Ct. 3196 (1976). The Court vacated and remanded to the Seventh Circuit for further consideration in light of its decision in *National League of Cities v. Usery*.

<sup>3</sup>29 U.S.C. §§ 201-19 (1970).

<sup>4</sup>406 F. Supp. 826 (D.D.C. 1974).

<sup>5</sup>The district court proceedings were not reported.

<sup>6</sup>517 F.2d 1179 (7th Cir. 1975).

<sup>7</sup>392 U.S. 183 (1968). *Wirtz* upheld 1961 and 1966 amendments to the FLSA, which extended the Act to cover fellow employees of those protected by the 1938 Act and employees of hospitals and schools, including those owned and operated by states.



studied alongside *Marbury v. Madison*<sup>8</sup> and *Martin v. Hunter's Lessee*<sup>9</sup> as landmarks in development of the federal system.

The FLSA, and the 1974 amendments to the Act, are based on the power of Congress to regulate commerce among the states.<sup>10</sup> In reviewing congressional exercise of the commerce power, decisions of the United States Supreme Court invalidating legislation can be placed in two groups. First, there are those cases holding that Congress has overreached the power granted to it by the Constitution. In these cases the judgment of the Court has been that Congress has attempted to regulate an activity which is not a part of commerce and the legislation is invalid simply because Congress lacks the power to regulate the activity in question.<sup>11</sup> The second group of cases in which the Court has invalidated legislation based on the commerce power includes those cases in which the Court concludes the activity being regulated is subject to the power of Congress under the commerce clause, but the legislation is invalid because it contravenes a specific constitutional limitation on the power of Congress.<sup>12</sup>

An accurate assessment of which of these two lines of reasoning is the basis of the holding in a given case is indispensable to an assessment of the future ramifications of the case. Cases in the first group reflect the extent of the power granted to Congress by the enumerated powers of the Constitution, whereas cases in the second group define the specific limitations upon these enumerated powers. It appears the decision in *National League of Cities v. Usery* falls within the second group.

Mr. Justice Rehnquist begins his analysis by suggesting that the plenary power of Congress to regulate commerce is not at issue in this case.

It is established beyond peradventure that the Commerce Clause of Art. I of the Constitution is a grant of plenary authority to Congress. . . . Appellants in no way

<sup>8</sup>5 U.S. (1 Cranch) 137 (1803).

<sup>9</sup>14 U.S. (1 Wheat.) 304 (1816).

<sup>10</sup>U.S. CONST. art. I, § 8, cl. 3.

<sup>11</sup>*See, e.g., Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

<sup>12</sup>*See, e.g., United States v. Butler*, 297 U.S. 1 (1936). This basic model of constitutional decision making was first suggested by Chief Justice Marshall in *Gibbons v. Ogden*, 22 U.S. 1 (1824). Chief Justice Marshall said:

We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

*Id.* at 86.

challenge these decisions establishing the breadth of authority granted Congress under the commerce power. Their contention, on the contrary, is that when Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained . . . in the Sixth Amendment . . . or the Due Process Clause of the Fifth Amendment. . . . Appellant's essential contention is that the 1974 amendments to the Act, while undoubtedly within the scope of the Commerce Clause, encounter a similar constitutional barrier because they are to be applied directly to the States and subdivisions of States as employers.<sup>13</sup>

This introduction plainly suggests the Court is not concerned with the scope of the commerce power, but with specific limitations imposed on that power by other provisions in the Constitution. This characterization cannot, however, be made unequivocally, since the opinion concludes:

We hold that insofar as the challenged amendments operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3.<sup>14</sup>

A strict reading of this concluding paragraph would be inconsistent with the Court's earlier statement of the case, and it is therefore probably not to be read too literally. Apart from this one sentence, the opinion is squarely based on constitutional provisions other than the commerce provision.

The constitutional provision which is held to restrict the commerce power so as to preclude extension of the FLSA to public employers is the tenth amendment.<sup>15</sup> Justice Rehnquist wrote,

This Court has never doubted that there are limits upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers to tax or to regulate commerce which are conferred by Art. I of the Constitution. . . . [A]n express declaration of this limitation is found in the Tenth Amendment . . . .<sup>16</sup>

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<sup>13</sup>96 S. Ct. at 2468-69 (citations omitted).

<sup>14</sup>*Id.* at 2474.

<sup>15</sup>U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

<sup>16</sup>96 S. Ct. at 2469-70.

Although the Court relied on *Fry v. United States*,<sup>17</sup> *National League of Cities v. Usery* is the first case to invalidate congressional legislation on the basis of the tenth amendment since President Franklin D. Roosevelt announced his "court packing" plan in February 1937. This fact is the most significant aspect of the case and the source of the greatest concern regarding future impact of the decision.

A reliable guide to future impact of a newly-announced rule can often be found in the Court's statement of the rule. Justice Rehnquist's statement provides some assistance in analyzing the rule of this case:

The question we must resolve in this case, then, is whether these determinations [the wages to be paid public employees, the hours they work and overtime compensation] are "functions essential to separate and independent existence," . . . so that Congress may not abrogate the States' otherwise plenary authority to make them.<sup>18</sup>

A further elaboration of which functions of a state government and its political subdivisions are "essential to separate and independent existence" is not given in the opinion. Some enlightenment may be found in the two reasons given by the Court for its holding that establishment of wages, hours, and overtime compensation by a public employer is such an essential function. First, the Court cites the increase in costs for personnel which the FLSA would impose on states. The opinion dramatizes this factor by reciting allegations from the complaint, which the Court accepts as true, regarding predicated costs and the programs which plaintiffs assert they will be forced to abandon in order to meet these increased costs.<sup>19</sup>

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<sup>17</sup>421 U.S. 542 (1975). The Court found no tenth amendment violation in wage regulations of the Economic Stabilization Act of 1970.

<sup>18</sup>96 S. Ct. at 2471.

<sup>19</sup>The Court's use of these figures is an intriguing example of judicial decision making. Plaintiff's complaint was dismissed by the district court so there is no evidence before the Supreme Court at the time it is deciding the case. Nonetheless, Justice Rehnquist says that since the district court decided the case below on a motion to dismiss, the Supreme Court will take all "well pleaded allegations as true." The Court in this case decides the issue raised by the complaint on its merit by declaring the challenged legislation unconstitutional. This is completely different from accepting well pleaded allegations as true for the purpose of deciding, on a motion to dismiss, whether the complaint states a claim upon which relief can be granted. FED. R. CIV. P. 12(b) (6). A decision on a 12(b) (6) motion has no concrete impact on the basic controversy and benefits the plaintiff only if he can prove that the facts are as he has alleged in the complaint. Here the case has been decided on its merits, with the allegations providing part of the

Justice Rehnquist minimizes the impact of these allegations, emphasizing that they are not "crucial to resolution of the issue presented . . . ."<sup>20</sup> This leaves the conclusion that the critical fact is that the FLSA would cost money.

The second reason the Court gives for holding that the 1974 amendments interfered with essential functions of sovereignty is that "the Act displaces state policies regarding the manner in which they will structure delivery of those governmental services which their citizens require."<sup>21</sup> This reason is more basic to the judgment of the Court than the fiscal impact, but it gives little guidance concerning the manner in which the Court will determine what functions are essential.

Ramifications of the decision are wide open. The decision revives the tenth amendment and many "overregulated" institutions, public and private, will be anxious to utilize it. In that sense, this could be the start of something big. The most significant unanswered question, which is raised by Justice Brennan in dissent, is the impact the decision will have on state legislation. Mr. Justice Brennan says, "Certainly the paradigm of sovereign action—action *qua* State—is in the enactment and enforcement of state laws."<sup>22</sup>

The fears expressed by Justice Brennan are somewhat tempered for the short term by the fact that Mr. Justice Blackmun, the fifth member of the majority, qualifies his concurrence. In his opinion, the case "does not outlaw federal powers in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."<sup>23</sup>

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basis of the decision, yet the plaintiff will never be called upon to prove the truth of the allegations.

Allegations of the fiscal implications of the amendments are not the kinds of facts on which the Court would ordinarily base a decision without some proof. The allegations are vague. For example, the estimate of California as to impact on its budget varies by 100 percent; the estimate is somewhere between 8 million and 16 million dollars. Some of the allegations are incredible. The Court says that Cape Girardeau, Mo., estimated its annual budget for fire protection might be increased by from \$250,000 to \$400,000 over the then-current figure of \$350,000. 96 S. Ct. at 2471. Can it be possible that the imposition of a minimum wage provision and time and a half for overtime could more than double fire protection costs for any city?

<sup>20</sup>96 S. Ct. 2474.

<sup>21</sup>*Id.* at 2472. The Court noted that imposition of minimum wage requirements would interfere with a state's policy of hiring persons with little training or experience, such as students, at lower wages.

<sup>22</sup>*Id.* at 2485.

<sup>23</sup>*Id.* at 2476. Justice Blackmun interprets the majority opinion as adopting a "balancing" approach.

One significant issue left open by the case is the impact it will have on existing, pervasive federal regulations which are under broadside attack today. These bureaucratic regulations often control decisions of state officials in a much more comprehensive and restrictive way than the establishment of minimum wage and overtime provisions. Possibly, if the court is willing to invalidate congressional legislation on the basis of the tenth amendment, the regulations of the bureaucrats will also be exposed to a new level of scrutiny. At least, state officials who have been very vocal in their dissatisfaction with federal regulations in recent years will be given new confidence to challenge these regulations in litigation in federal court.

### B. Trial by Jury

In *In re Public Law No. 305 & Public Law No. 309 of the Indiana Acts of 1975*,<sup>24</sup> a sua sponte proceeding,<sup>25</sup> the Indiana Supreme Court followed recent federal decisions<sup>26</sup> and held that a statutory provision for six-member juries is constitutional.

Upholding a statute<sup>27</sup> which requires six-member juries in both civil and criminal cases in county courts, the supreme court overruled *Miller's National Insurance Co. v. American State Bank*,<sup>28</sup> in which it had held that the article 1, section 20, provision of the Indiana Constitution holding the right to jury trial inviolate<sup>29</sup> prevents the legislature from changing the number of jurors.

The court relied on *Williams v. Florida*,<sup>30</sup> in which the United States Supreme Court held provision for a six-member jury does not offend the fourteenth amendment to the United States Constitution,<sup>31</sup> and noted the "obvious legislative intent" of the statute<sup>32</sup>

<sup>24</sup>334 N.E.2d 659 (Ind. 1975). This case is also discussed in Harvey, *Civil Procedure, supra*, and Marple, *Evidence, infra*.

<sup>25</sup>334 N.E.2d at 662. The court noted that while the Supreme Court traditionally does not issue opinions sua sponte, this legislation, reorganizing portions of the state court system, required interpretation to give uniform effect to the legislative mandate.

<sup>26</sup>*See, e.g.,* *Cooley v. Strickland Transp. Co.*, 459 F.2d 779 (5th Cir.), *cert. denied*, 413 U.S. 923 (1972); *Lynch v. Baxley*, 386 F. Supp. 378 (N.D. Ala. 1974).

<sup>27</sup>IND. CODE § 33-10.5-7-6 (Burns Supp. 1976).

<sup>28</sup>206 Ind. 511, 190 N.E. 433 (1934).

<sup>29</sup>*Id.* at 515, 190 N.E. at 435. The court cited *Allen v. Anderson*, 57 Ind. 388 (1877), holding that inviolate means "continue as it was."

<sup>30</sup>399 U.S. 78 (1970).

<sup>31</sup>The Court held in *Williams* that jury membership need not be fixed at twelve and individual states may develop their own views concerning larger or smaller juries. *Id.* at 103.

<sup>32</sup>334 N.E.2d at 663.

in holding that provision for six-member juries violates neither the Federal nor the Indiana Constitution.

### C. Equal Protection

#### 1. Classification Based on Sex

In *Kinslow v. Cook*<sup>33</sup> the Indiana Court of Appeals held that a mother was denied equal protection by the requirement of former Indiana Code section 34-1-1-8 that she show death, desertion, or imprisonment of her child's father before being permitted to sue in her own right for wrongful death of that child.<sup>34</sup> The complaint was filed by Mr. and Mrs. Kinslow as mother and father, and Mrs. Kinslow as administratrix of her son's estate.<sup>35</sup>

The court began its review of the statute with traditional low scrutiny language,<sup>36</sup> but struck down the classification and the statute, treating the legislature with less than maximum deference. Quoting *Haas v. South Bend Community School Corp.*,<sup>37</sup> the *Kinslow* court held:

In order to withstand a constitutional challenge founded upon a denial of equal protection the statutory classification . . . must be reasonable . . . and *must rest upon some ground of difference* having a fair and substantial relation

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<sup>33</sup>333 N.E.2d 819 (Ind. Ct. App. 1975).

<sup>34</sup>The constitutionality of the following portion of the old statute was at issue: "A father, or in case of his death, or desertion of his family, or imprisonment, the mother, . . . may maintain an action for the injury or death of a child . . ." IND. CODE § 34-1-1-8 (Burns 1973). The statute was amended in 1975 to provide: "The father or mother jointly, or either of them by naming the other parent as a co-defendant to answer as to his or her interest . . . may obtain an action for the injury or death of a child . . ." IND. CODE § 34-1-1-8 (Burns Supp. 1976).

<sup>35</sup>Although refusing to decide whether Mrs. Kinslow had been erroneously dismissed as administratrix, the court noted that she obviously could not recover as both parent and administratrix under Indiana law.

<sup>36</sup>"The equal protection guarantees of both state and federal constitutions do not prohibit statutory classifications *so long as they are reasonable and not arbitrary*." 333 N.E.2d at 821 (emphasis added). Standards of review appropriate to an equal protection case include a range from (1) a "strict" or "high scrutiny" test, applied to classifications based on certain "suspect" traits such as race or national origin, or which impinge on fundamental rights such as the right to travel or associate freely, to (2) a "low scrutiny" test, which presumes the constitutionality of the classification being examined. Under high scrutiny a statute will be invalidated unless it is justified by a compelling governmental interest. When the low scrutiny test is applied the statute is valid if there is a reasonable relationship to a governmental interest.

<sup>37</sup>259 Ind. 515, 289 N.E.2d 495 (1972). For an extensive discussion of this case see Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661 (1973).

to the object of legislation, so that all persons similarly circumstanced shall be treated alike.<sup>38</sup>

Under classic low scrutiny any "reasonably conceivable" set of facts may justify a statutory classification.<sup>39</sup> Terms like "substantial relationship" and "all persons similarly circumstanced" suggest that the court looked more closely at the classification than required by the low scrutiny test. Classification on the basis of sex appears to have triggered an intermediate level of review.

The court's failure to defer to legislative judgment is apparent in the closeness with which it scrutinized the stated purpose of the classification. Defendant asserted that a rational basis for the classification lay in its prevention of double recovery, disallowing an action in the name of each parent. Selection of the father as the one to bring the action was asserted to be permissible because of his superior right to the child's services and primary duty of support.

The court found that this purpose did not require preference of one parent over another, observing that the double recovery argument loses its force in view of the ease with which the omitted parent can be joined.<sup>40</sup> Assuming, however, that the double recovery purpose was served by providing a preferred class, the court disagreed with defendant's assertion that the preference of father over mother was reasonable. The court referred to recent legal trends undercutting the assertion that the

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<sup>38</sup>333 N.E.2d at 821 (emphasis in original). The language in *Haas* is taken from *Reed v. Reed*, 404 U.S. 71, 76 (1971). The court also cites *Stanton v. Stanton*, 421 U.S. 7 (1975), and *Indiana High School Athletic Ass'n v. Raike*, 329 N.E.2d 66 (Ind. Ct. App. 1975). Both *Reed* and *Stanton* deal with classification based on sex. In *Raike* the court recognized a classification bearing on the right of married persons to participate in high school athletics as triggering an intermediate type of scrutiny. See Stanmeyer, *Constitutional Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 99, 100-01 (1975), for a discussion of intermediate scrutiny. This test calls for a fair and substantial relation between the classification and the legislative purpose.

<sup>39</sup>Classic low scrutiny is defined by Professor Stroud as follows:

First, the burden of showing the invalidity of the statutory classification is on the person asserting such invalidity. Secondly, it is sufficient to find any "reasonably conceivable" legitimate government purpose in the classification. Thirdly, a court will assume as true any "reasonably conceivable" set of facts which show that the members of the class burdened by the statute do possess the purpose-trait, i.e., are those persons similarly situated with respect to the purpose of the statute. Fourth, a court accepts as reasonable a significant deviation from the ideal classification in the form of under-inclusion and over-inclusion.

Stroud, *supra* note 37, at 663-64 (footnotes omitted).

<sup>40</sup>333 N.E.2d at 821 n.4.

father's rights and duties are superior,<sup>41</sup> and held that recognition of the father's primary rights and duties includes a tacit admission of the mother's secondary rights and duties which could allow damages to go to her.

The court found the classification was "arbitrary" and not based on "some ground of difference" between the parents substantially related to the object of the legislation.<sup>42</sup>

## 2. *Classic Low Scrutiny for Economic Classification*

In *Allen v. Pavach*,<sup>43</sup> the Indiana Supreme Court<sup>44</sup> refused to strike down a classification favoring surety bondsmen, who are employed by insurance companies, over professional bondsmen with respect to the amount of deposit required to obtain a license and limitations on bail bonds written. The court cited *Dandridge v. Williams*<sup>45</sup> and clearly indicated that it was applying low level scrutiny: "[L]egislative classifications will not be set aside if any state of facts rationally justifying them is demonstrated to or perceived by the courts."<sup>46</sup> Citing statutory provisions which require insurers to maintain substantial assets,<sup>47</sup> the court found a rational basis for a \$25,000 difference in deposit requirements between the two classes of bondsmen. Over-inclusion and under-inclusion did not concern the court. "If the classification has some reasonable basis, it does not offend the Constitution merely because the classification is not mathematically precise or because in practice it results in some inequality."<sup>48</sup>

Discriminatory classification involved in limiting the amount of bail bonds which may be written by professional bondsmen and setting no limit for surety bondsmen was not dealt with in detail. The court relied on its discussion of the deposit issue

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<sup>41</sup>The court cited *Troue v. Marker*, 253 Ind. 284, 252 N.E.2d 800 (1969) for the proposition that spouses are equal before the law, and a section of the Indiana Code as establishing equality between parents with respect to support obligations. See IND. CODE § 31-1-11.5-12 (Burns Supp. 1976).

<sup>42</sup>333 N.E.2d at 822.

<sup>43</sup>335 N.E.2d 219 (Ind. 1975).

<sup>44</sup>Chief Justice Givan wrote the opinion, in which Justices Arterburn and Hunter concurred. Justice Prentice dissented without opinion and Justice DeBruler concurred in the result.

<sup>45</sup>397 U.S. 471 (1970). *Dandridge*, a classic low scrutiny case, is discussed in Stroud, *supra* note 37, at 664.

<sup>46</sup>335 N.E.2d at 222.

<sup>47</sup>IND. CODE §§ 27-1-6-15 to -16 (Burns 1975) and 23-1-16-2 (Burns 1972). The court also cited IND. CODE § 27-1-1-1 (Burns 1975), which provides for control over insurance companies by the Department of Insurance.

<sup>48</sup>335 N.E.2d at 222.



and quoted at length from *Ferguson v. Skrupa*,<sup>49</sup> which espoused a hands-off policy with respect to economic classification.

Justice DeBruler in his concurring opinion favored more fact-finding below, inquiring into the existence of a "rational basis for the disparate treatment . . . ."<sup>50</sup>

### 3. *Indiana's Guest Statute*

In *Sidle v. Majors*,<sup>51</sup> the United States Court of Appeals for the Seventh Circuit upheld the Indiana guest statute<sup>52</sup> in the face of an equal protection challenge. Plaintiff, a guest in an Indiana automobile, sued her Indiana host for negligence and for wanton or willful misconduct. The parties proceeded to trial on the count for wanton or willful misconduct, but defendant was granted summary judgment on the general negligence claim, on the basis of the guest statute. Pursuant to Indiana Appellate Rule 15(N)<sup>53</sup> the court of appeals certified to the Indiana Supreme Court questions of validity under the Indiana Constitution,<sup>54</sup> and the supreme court consolidated *Sidle* with a state case in which the trial court had ruled the guest statute unconstitutional.<sup>55</sup> Noting an obligation to refrain from undue interference with the legislature and a general presumption of a statute's constitutionality, the court

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<sup>49</sup>372 U.S. 726 (1963).

<sup>50</sup>335 N.E.2d at 224-25.

<sup>51</sup>536 F.2d 1156 (7th Cir.), *cert. denied*, 97 S. Ct. 366 (1976).

<sup>52</sup>IND. CODE § 9-3-3-1 (Burns 1973), which provides:

The owner, operator, or person responsible for the operation of a motor vehicle shall not be liable for loss or damage arising from injuries to or death of a guest, while being transported without payment therefor, in or upon such motor vehicle, resulting from the operation thereof, unless such injuries or death are caused by the wanton or wilful misconduct of such operator, owner, or person responsible for the operation of such motor vehicle.

<sup>53</sup>IND. R. APP. P. 15(N) provides for certification of questions of state law from federal courts to the Indiana Supreme Court.

<sup>54</sup>*Sidle v. Majors*, 341 N.E.2d 763 (Ind. 1976). *See* 9 IND. L. REV. 885 (1976). Specifically, the Seventh Circuit wanted an opinion about possible violation of art. 1, section 12, and art. 1, section 23, of the Indiana Constitution. IND. CONST. art. 1, § 12, provides:

All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

IND. CONST. art. 1, § 23, provides: "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

<sup>55</sup>*Dempsey v. Leonherdt*, 341 N.E.2d 763 (Ind. 1976). Review in such a case proceeds directly to the supreme court under Indiana Rule of Appellate Procedure 4(A) (8).

rejected plaintiff's contention that high level scrutiny was appropriate,<sup>56</sup> and viewed the equal protection claim in these terms:

Our guest statute precludes a guest passenger from recovering damages for personal injuries sustained merely by the negligence of the owner or operator. Being inoperative as to passengers who were not guests, the statute creates two classifications of passengers—guests and non-guests, who are treated vastly differently under circumstances that are otherwise identical. The inequity is patent. The issues are whether or not the classification is reasonable and bears a fair and substantial relation to the legitimate purpose of the statute. The presumptions are that it is and does, and the burden is upon the plaintiff to show the contrary.<sup>57</sup>

The court found two "reasonably conceivable" legitimate governmental purposes for the statute—fostering hospitality through insulating generous drivers from suit by ungrateful guests and eliminating collusive suits. Although acknowledging that these purposes are not immediately perceived from a reading of the statute and no legislative history is available, the court determined that it could look to any possible logical purpose for the statutory classification, even if "considerable speculation" was required.

The court found a third possible purpose for the legislative classification—prevention of the "benevolent thumb" syndrome. This was described as the tendency of juries, perceiving the real defendant to be an insurance company, "to weigh their 'benevolent thumbs' along with the evidence of the defendant's negligence."<sup>58</sup>

Having identified three probable purposes of the statute, the court held that resulting over-inclusion or under-inclusion would be acceptable: "We think it no constitutional infirmity that a statute may not operate to perfection, if it may reasonably be expected to operate effectively."<sup>59</sup>

Thus, applying pure low scrutiny reasoning and according maximum deference to the legislature, the court found the guest statute was not violative of the state equal protection clause.<sup>60</sup>

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<sup>56</sup>341 N.E.2d at 766. Plaintiff argued that the right to bring a common law negligence suit is a fundamental right.

<sup>57</sup>*Id.* at 767.

<sup>58</sup>*Id.* at 772.

<sup>59</sup>*Id.* at 770.

<sup>60</sup>The court also concluded that the statute did not violate art. 1, section 12, of the Indiana Constitution.

The Seventh Circuit did not agree with the analysis of the Indiana Supreme Court, but reached the same conclusion on the basis of a Utah case which was appealed to the United States Supreme Court.<sup>61</sup> The Utah court upheld the guest statute and the appeal was dismissed for want of a substantial federal question. Such a dismissal is an adjudication on the merits and thus binding on the circuit courts.<sup>62</sup>

Before reaching that result, the Seventh Circuit rejected the legislative purposes advanced by the Indiana court, suggesting that widespread liability insurance eliminates notions of ingratitude and that the anticollusion purpose is not met when guest and host are still free to collude on the existence of compensation or the existence of willful or wanton misconduct. Looking to the new "benevolent thumb" theory, the court noted that in Connecticut no reduction in automobile insurance premiums followed enactment of a guest statute.

The court distinguished *Silver v. Silver*,<sup>63</sup> a 1929 case relied on by the Indiana court, in which the United States Supreme Court upheld a guest statute against an equal protection attack based on the statute's application to motor vehicles only, as distinguished from other forms of transportation. *Silver* did not deal with the division of possible plaintiffs into burdened and benefited classes. In light of the age of the *Silver* decision, changes in the economic climate, the split among courts dealing with the question,<sup>64</sup> and the different nature of the equal protection claim now advanced, the Seventh Circuit suggested that there is a need for conclusive resolution of the issue.

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<sup>61</sup>*Cannon v. Oviatt*, 520 P.2d 883 (Utah), *appeal dismissed for want of a substantial federal question*, 419 U.S. 810 (1974).

<sup>62</sup>*Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975). Appellate jurisdiction under 28 U.S.C. § 1257(2) is not discretionary, and thus dismissal because the court has branded the federal question insubstantial amounts to adjudication on the merits.

<sup>63</sup>280 U.S. 117 (1929).

<sup>64</sup>Cases which have upheld guest statutes include: *Richardson v. Hansen*, 527 P.2d 536 (Colo. 1974); *Justice v. Gatchell*, 325 A.2d 97 (Del. 1974); *Delany v. Baedame*, 49 Ill. 2d 168, 274 N.E.2d 353 (1971); *Keasling v. Thompson*, 217 N.W.2d 687 (Iowa 1974); *Duerst v. Limbocker*, 525 P.2d 99 (Or. 1974); *Behrns v. Burke*, 229 N.W.2d 86 (S.D. 1975); *Cannon v. Oviatt*, 520 P.2d 883 (Utah), *appeal dismissed for want of a substantial federal question*, 419 U.S. 810 (1974). Cases which have declared guest statutes unconstitutional as a violation of equal protection include: *Brown v. Merlo*, 8 Cal. 3d 855, 506 P.2d 212 (1973); *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974); *Henry v. Bauder*, 213 Kan. 751, 518 P.2d 362 (1974); *Manistee Bank & Trust Co. v. McGowan*, 394 Mich. 655, 232 N.W.2d 636 (1975); *Laakonen v. Eighth Jud. Dist. Ct.*, 538 P.2d 574 (Nev. 1975); *Johnson v. Hassett*, 217 N.W.2d 771 (N.D. 1974); *McGeehan v. Bunch*, 88 N.M. 308, 540 P.2d 238 (1975).

*D. Substantive Due Process*

In *Fitzgerald v. Porter Memorial Hospital*,<sup>65</sup> the Seventh Circuit Court of Appeals refused to extend the doctrine of marital privacy to include a right of a father to be present in the delivery room when his child is born if the public hospital has prohibited his presence for medical reasons. The court also held that exclusion of the father did not improperly restrict the right of a physician to practice medicine.

Plaintiffs brought suit in district court for a temporary restraining order, declaratory relief, and damages. Plaintiffs requested different remedies depending upon whether or not their child had been born; their request for class certification was not ruled on.<sup>66</sup> Jurisdiction was premised on 42 U.S.C. § 1983, and the first, fourth, ninth, and fourteenth amendments to the United States Constitution. After hearing testimony of one physician for the plaintiffs and taking affidavits from both sides, the district court granted defendant's motion to dismiss both the request for a temporary restraining order and the underlying claim. The motion to dismiss was granted on the grounds that plaintiffs lacked standing to assert the right of their doctors<sup>67</sup> and, since the hospital was not denying access to facilities or totally disapproving a recognized operation, the complaint failed to state a cognizable claim. On appeal, plaintiffs sought to have the case reversed and remanded for consideration on the merits at the district court level.

Judge Stevens, writing for the majority of the Seventh Circuit panel, upheld the dismissal for failure to state a cognizable claim. The court noted that the right to privacy protects individuals from "unwarranted public attention, comment or exploitation,"<sup>68</sup> and lamented a new breed of privacy cases designed to secure other types of protection. The court determined that the decision to allow a father's presence and participation during the birth of his child is not an issue which requires constitutional protection.

The birth of a child is an event of unequalled importance in the lives of most married couples. But deciding the question whether the child shall be born is of a different magnitude from deciding where, by whom, and by what method he or she shall be delivered. In its medical aspects,

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<sup>65</sup>523 F.2d 716 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1518 (1976).

<sup>66</sup>*Id.* at 719.

<sup>67</sup>The court of appeals did not agree on the standing issue, but refrained from reversing the district court on that question since the determination of failure to state a claim was dispositive of the case.

<sup>68</sup>523 F.2d at 719.

the obstetrical procedure is comparable to other serious hospital procedures. We are not persuaded that the married partners' special interest in their child gives them any greater right to determine the procedure to be followed at birth than that possessed by other individuals in need of extraordinary medical assistance.<sup>69</sup>

Since plaintiffs implicitly acknowledged that the husband had no right to be present absent consent of the attending physician, the court indicated that they should also recognize the necessity for hospital approval based on medical reasons. The court thus held that a hospital may exclude a father from the delivery room if that exclusion is for medical reasons.<sup>70</sup>

Plaintiffs had also asserted that the hospital rule interfered with their doctors' right to practice medicine. The court was unpersuaded, holding that the right asserted by plaintiffs was not entitled to constitutional protection and thus their physicians were not unconstitutionally restricted. The court concluded by deferring to the medical profession, suggesting that courts should not become involved in deciding the medical desirability of having fathers in the delivery room.

Focusing on the fact that no hearing on the merits was held at the district level, the dissent favored reversal and remand for trial.<sup>71</sup> Quoting at length from affidavits submitted by plaintiffs' expert supporting the medical desirability of permitting fathers to be present during delivery, the dissent found the right within the physician-patient relationship and within the right of a patient to control the manner in which his or her body is dealt with. The dissent also found the reasons presented by the hospital for its rule to be "so non-compelling as to be virtually non-existent . . ."<sup>72</sup>

### *E. Free Speech*

In *Stults v. State*,<sup>73</sup> the Indiana Court of Appeals examined circumstances surrounding a charge of disorderly conduct and found that certain modes of speech are not constitutionally protected and may constitute criminal conduct.

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<sup>69</sup>*Id.* at 721.

<sup>70</sup>The primary reason presented by the hospital for its rule was that the physical arrangement of the labor and delivery rooms would allow laboring mothers to be seen from a common corridor by husbands of other women. The hospital also relied on absence of facilities for husbands to put on surgical gowns. *Id.* at 718 n.6.

<sup>71</sup>523 F.2d at 722-24 (Sprecher, J., dissenting).

<sup>72</sup>*Id.* at 724.

<sup>73</sup>336 N.E.2d 669 (Ind. Ct. App. 1975).

Defendant was stopped by off-duty policemen working as security guards in a discount department store who suspected her and her sister of shoplifting. The sisters objected to being stopped. An argument ensued, a group of onlookers gathered, and the women's language became loud and interspersed with curses. One of the policemen warned the defendant to "cease with the language and all the noise,"<sup>74</sup> and eventually both women were arrested and charged with disorderly conduct. A search later revealed that they had no merchandise in their possession and thus were not guilty of shoplifting as the guards had suspected.<sup>75</sup>

A municipal court jury found the defendant guilty of disorderly conduct and she was sentenced to pay a fine of \$15 and \$50 costs. The Criminal Court of Marion County affirmed and this appeal was filed.

Defendant contended that the disorderly conduct statute<sup>76</sup> had been previously construed to apply to "pure speech"—i.e. spoken words unaccompanied by other acts—only if that speech has a tendency to lead to violence,<sup>77</sup> and that her behavior merely aroused the curiosity of onlookers.<sup>78</sup> While the court did not determine whether the defendant's contention had merit,<sup>79</sup> it ruled that her speech fell directly into the category of "fighting words" which the Supreme Court has held constitutionally unprotected

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<sup>74</sup>*Id.* at 671.

<sup>75</sup>*Id.* In Indiana there is no offense known as "shoplifting." The behavior usually referred to as shoplifting is a violation of a section of the Offenses Against Property Act, IND. CODE § 35-17-5-3(a) (Burns 1975) (repealed effective July 1, 1977).

<sup>76</sup>IND. CODE § 35-27-2-1 (Burns 1975) (repealed effective July 1, 1977), provides:

Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars [\$500] to which may be added imprisonment for not to exceed one hundred eighty [180] days.

<sup>77</sup>336 N.E.2d at 673. *See also* Hess v. State, 260 Ind. 427, 297 N.E.2d 413 (1973); Miller v. State, 258 Ind. 79, 279 N.E.2d 222 (1972); Whited v. State, 256 Ind. 386, 269 N.E.2d 149 (1971).

<sup>78</sup>Defendant also argued that the entire incident arose because the police wrongfully accused her of shoplifting; that her speech was only directed toward police officers and as such a conviction for disorderly conduct cannot lie; and finally that the trial court erred in not giving certain instructions tendered by the defendant.

<sup>79</sup>The court noted, "No case has held that the failure of the proscribed speech behavior to produce violence is proof that the speech behavior did not have the tendency to lead to violence." 336 N.E.2d at 673.

since 1942.<sup>60</sup> Thus, although defendant's conduct was "pure speech," her behavior was not constitutionally protected. In affirming the disorderly conduct conviction, the court carefully limited its holding:

We must note that we do not hold that speech containing vulgarities or obscenities is *per se* constitutionally unprotected. . . . Nor do we hold that "fighting words" *per se* constitute a violation of the disorderly conduct statute. Instead, we hold that personal epithets and verbal abuse (which may or may not contain vulgarities or obscenities) do not enjoy constitutional protection, and that engaging in such activity may under certain circumstances constitute disorderly conduct.<sup>61</sup>

#### F. Zoning

In *City of Evansville v. Reis Tire Sales*,<sup>62</sup> the court of appeals held that a city zoning ordinance unconstitutionally restricted the owner's use of property.

Reis was the owner of vacant real estate in Evansville which had been restrictively zoned for single family residences. Contending that the condition of the terrain substantially increased the cost of construction, Reis applied to the Area Plan Commission for rezoning to build multifamily residential apartments, development which would bring a greater return on investment and thus justify increased costs of construction. The commission recommended the change, but the Evansville Common Council denied the application for rezoning. Reis brought suit requesting a declaratory judgment allowing him to develop the property with multifamily dwellings.<sup>63</sup>

Evidence was presented at trial substantiating the claim that increased costs of developing the property would make it unprofitable to build single family residences. The city introduced evidence that building multiresidence apartments would create a safety

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<sup>60</sup>*Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942):

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.

*Id.* at 571-72.

<sup>61</sup>336 N.E.2d at 674.

<sup>62</sup>333 N.E.2d 800 (Ind. Ct. App. 1975).

<sup>63</sup>The suit also requested a mandate for issuance of a building permit for such use. *Id.* at 801.



hazard due to increased traffic in the otherwise single family residential area.

The trial court entered judgment for Reis, ruling that the zoning ordinance as it applied to the property in issue violated article 1, sections 21 and 23 of the Indiana Constitution<sup>84</sup> and the fifth and fourteenth amendments to the United States Constitution.<sup>85</sup>

On appeal, the court acknowledged that zoning is a proper exercise of the state's police powers, but noted that exercise of that power may result in a taking of property without proper compensation, in violation of constitutional law.<sup>86</sup> While every burden placed on property is not to be viewed as a confiscation or taking,<sup>87</sup> zoning which prevents any use of property for any reasonable purpose is unconstitutional.<sup>88</sup>

Finding sufficient evidence to support a determination that Reis's property could not reasonably be used for the purpose for which it had been zoned, the court of appeals affirmed the lower court decision and held the ordinance unconstitutional as applied to the property in issue.<sup>89</sup>

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<sup>84</sup>IND. CONST. art. 1, § 21, provides: "No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered." See note 54 *supra* for the text of IND. CONST. art. 1, § 23.

<sup>85</sup>The pertinent language is: "nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The fourteenth amendment applies this provision to the states.

<sup>86</sup>The court relied on *Town of Homecroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958); *Board of Zoning App. v. Koehler*, 244 Ind. 504, 194 N.E.2d 49 (1963); and *Metropolitan Bd. of Zoning App. v. Sheehan*, 313 N.E.2d 78 (Ind. Ct. App. 1974). These opinions are grounded on *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in which the Supreme Court held that zoning ordinances *may* be constitutional police power if asserted for the public welfare. Whether such assumption of power is legitimate was found to depend on surrounding circumstances and conditions.

<sup>87</sup>The court cited *Board of Zoning App. v. Schulte*, 241 Ind. 339, 172 N.E.2d 39 (1961), in which the Indiana Supreme Court stated, "The resulting depreciation in value to certain private property as a result of the passage of a zoning ordinance which is for the general welfare, health or safety is not a ground for unconstitutionality." *Id.* at 348-49, 172 N.E.2d at 43.

<sup>88</sup>333 N.E.2d at 802, *citing* *Homecroft v. Macbeth*, 238 Ind. 57, 148 N.E.2d 563 (1958). A zoning ordinance was found unconstitutional in *Homecroft* because it deprived the owner of use of his property for any purpose for which it was reasonably adapted. The *Homecroft* court cited *Arverne Bay Constr. Co. v. Thatcher*, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938): "[A]n ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of property." 238 Ind. at 68, 148 N.E.2d at 569 (court's emphasis).

<sup>89</sup>333 N.E.2d at 802.



In *Board of Commissioners v. Kokomo City Plan Commission*,<sup>90</sup> the Indiana Supreme Court was asked to decide whether a statute authorizing extraterritorial land use planning was constitutional. The statute at issue<sup>91</sup> places cities in two categories. In one category are all cities in counties with master plans and a population of less than 84,000. The other category includes all cities having a master plan and a population of more than 84,000. A city in the former category may exercise extraterritorial planning on its own discretion; a city in the latter category must gain county approval in order to exercise authority outside its boundaries.<sup>92</sup> The record established that Howard County had a population of 83,000 and had enacted a master plan.

Suit was brought by the Board of Commissioners of Howard County alleging that the statute, which allowed the Kokomo City Plan Commission to exercise its authority outside the physical boundaries of the city without county approval, was unconstitutional in that it violated the fifth and fourteenth amendments to the Constitution guaranteeing equal protection and that the statute also violated article 4, section 23, of the Indiana Constitution.<sup>93</sup>

On cross motions for summary judgment, the trial court upheld the statute. The court of appeals reversed, holding that under article 4, section 23, of the Indiana Constitution the statute was unconstitutional.<sup>94</sup> The Indiana Supreme Court granted a petition to transfer and affirmed the trial court judgment.

Although the court engaged in an enlightening discussion of judicial review in equal protection cases, it never reached the merits, since it determined that the Board lacked standing.

Holding that none of the constitutional provisions relied on by the Board<sup>95</sup> provide protection for a county, the court held:

Since the constitutional provisions have not been construed to assure a county, as a governmental entity, rights equal to those granted other counties, and since a county has not been recognized as a sovereign which may protect

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<sup>90</sup>330 N.E.2d 92 (Ind. 1976), *rev'g* 310 N.E.2d 877 (Ind. Ct. App. 1974). See Shaffer, *Administrative Law*, *supra*, for another discussion of this case.

<sup>91</sup>IND. CODE § 18-7-5-34 (Burns 1974).

<sup>92</sup>330 N.E.2d at 98.

<sup>93</sup>*Id.* at 95.

<sup>94</sup>310 N.E.2d 877 (Ind. Ct. App. 1974).

<sup>95</sup>The County Commissioners contended that the challenged legislation contravened "the Fourteenth Amendment, § 1, of the United States Constitution and Art. 1, §§ 21 and 23, and Art. 4, §§ 22 and 23 of the Indiana Constitution." 330 N.E.2d at 99.

its citizens, we find that the County has no standing to raise the issue of constitutionality of this statute.<sup>96</sup>

The court perceived article 1, section 1, of the Indiana Constitution as guaranteeing the political and civil rights of only the human inhabitants of the state. Indiana's privileges and immunities clause was held applicable only to "citizens," and a county, which is not a citizen, is not protected. Similarly, the county was deemed to lack status to invoke article 4, section 23, of the Indiana Constitution,<sup>97</sup> but the court noted that an individual or nongovernmental corporation adversely affected by a statute would have standing to invoke this provision, which prohibits local or special laws.

The court did suggest in dictum that, as the record stood, the statute would have withstood low level scrutiny or the "reasonableness" test defined in the opinion, since the Board had not carried its burden of proof to overcome a presumption of constitutionality.<sup>98</sup>

## VI. Consumer Law

*David W. Gray\**

During the current survey period, major developments in consumer law involved the extension and redefinition of protections and remedies which were developed in previous years. Although no new major consumer-oriented legislation was enacted this year, several federal statutes were amended to extend or change their coverage.<sup>1</sup> Noteworthy cases in this survey period

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<sup>96</sup>*Id.* at 101.

<sup>97</sup>The court noted that no claim was made that the county, as a governmental entity, was injured by the statute and that such a claim would not be valid against the power of the state over its subdivisions.

<sup>98</sup>330 N.E.2d at 101.

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<sup>1</sup>Consumer Leasing Act of 1976, Pub. L. No. 94-240 (Mar. 23, 1976), amends the Truth in Lending Act, 15 U.S.C. §§ 1601-65 (1970); and the Equal Credit Opportunity Act Amendments of 1976, Pub. L. No. 94-239 (Mar. 23, 1976), amends the Equal Credit Opportunity Act of 1974, 15 U.S.C. §§ 1691-91f (Supp. V, 1975); the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145 (Dec. 12, 1975), repealed a section of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970), and a section of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970).

created some new rights,<sup>2</sup> extended previously created causes of action to apply to more classes of people,<sup>3</sup> and reaffirmed and re-defined recently created remedies.<sup>4</sup>

### A. Statutory Developments

#### 1. Amendments to the Equal Credit Opportunity Act

The 1976 amendments to the Equal Credit Opportunity Act amend title VII of the Consumer Credit Protection Act<sup>5</sup> so that it is now unlawful in granting credit to discriminate on the basis of race, color, religion, national origin, or age. The Equal Credit Opportunity Act of 1974<sup>6</sup> prohibited discrimination on the basis of sex or marital status in granting credit and gave the Federal Reserve Board power to enforce its provisions.<sup>7</sup> In an action by an individual, the penalties provided for denying credit on the basis of sex or marital status included actual damages, punitive damages up to \$10,000, and reasonable attorney's fees and costs.<sup>8</sup>

The 1976 amendments attempt to identify every irrelevant factor, not limited to sex or marital status, used in deciding whether or not to grant credit. After sex as a basis for discrimination, it appeared to Congress that age was the most common factor in such discrimination.<sup>9</sup> Although the potential creditor could protect himself by adequately securing a loan, older persons have been refused credit for such insufficient reasons as unavailability of credit life insurance, reduced income upon retirement, or the possibility that the applicant would not live through the credit term.<sup>10</sup>

One of the most important provisions added by the new amendments allows credit applicants to obtain a statement of

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<sup>2</sup>Guernsey v. Rich Plan of the Midwest, 408 F. Supp. 582 (N.D. Ind. 1976) (established private cause of action under the FTC Act).

<sup>3</sup>Barnes v. Mac Brown & Co., 342 N.E.2d 619 (Ind. 1976) (implied warranty of fitness for habitation extends to subsequent purchasers).

<sup>4</sup>Vernon Fire & Cas. Ins. Co. v. Sharp, 349 N.E.2d 173 (Ind. 1976) (affirming award of punitive damages in contract case); Jones v. Abriani, 350 N.E.2d 635 (Ind. Ct. App. 1976) (awarding punitive damages in a contract case and discussing rejection under the UCC).

<sup>5</sup>15 U.S.C. §§ 1601-91e (Supp. V, 1975).

<sup>6</sup>*Id.* §§ 1691-91e.

<sup>7</sup>*Id.* § 1691b.

<sup>8</sup>*Id.* § 1691e(e); see also Whaley, *Consumer Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 118, 126 (1975).

<sup>9</sup>The new amendments, of course, still allow a creditor to refuse credit to someone who has not yet reached the age of majority. S. REP. No. 589, 94th Cong. 2d Sess. 3 (1976).

<sup>10</sup>*Id.*

reasons for "adverse action" taken against them.<sup>11</sup> Congress apparently reasoned that this provision would help achieve the goals of the Act, since a creditor who knows he may have to explain his decision not to grant credit is less likely to rest that decision on improper grounds. A statement of reasons for adverse action may be given by the creditor along with a rejection, or the creditor may simply inform the applicant of his right to such a statement upon request.<sup>12</sup>

Another change in the Act made by the present amendments involves enforcement procedure and civil liability. Before the amendments, the Act could be enforced only by aggrieved individuals or by the Federal Reserve Board. Now, however, the Attorney General has authority to bring actions against violators.<sup>13</sup>

Potential civil liability for a prospective violator has been dramatically increased.<sup>14</sup> The individual plaintiff may still recover actual damages, punitive damages up to a limit of \$10,000, and attorney's fees. In class actions, however, recovery of punitive damages up to the lesser of \$500,000 or one percent of the creditor's net worth, in addition to actual damages and attorney's fees, is allowed.<sup>15</sup>

## 2. *Consumer Leasing Act of 1976*

Congress also amended the Truth in Lending Act<sup>16</sup> by passing the Consumer Leasing Act of 1976.<sup>17</sup> The stated purpose of this new law is to protect consumers against inadequate and misleading leasing information, to require full and complete disclosure of lease terms, and to limit liability in connection with leasing arrangements.<sup>18</sup> The Act applies only to personal property leased for personal, family, or household purposes for a period longer than four months and for a total obligation not exceeding \$25,000.<sup>19</sup> Therefore, the Act will primarily affect lease of expensive

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<sup>11</sup>Adverse action is defined as a rejection of credit, revocation, unilateral change in the terms of a credit plan, or refusal to grant substantially all the credit requested. 15 U.S.C.A. § 1691(d) (6) (Supp. 2, 1976).

<sup>12</sup>*Id.* § 1691(d) (2).

<sup>13</sup>*Id.* § 1691e(h).

<sup>14</sup>Prior to the amendments, the Act provided for recovery of actual damages, punitive damages up to \$10,000 and reasonable attorney's fees and costs. 15 U.S.C. § 1691e(b) (Supp. V, 1975).

<sup>15</sup>15 U.S.C.A. § 1691e(b) (Supp. 2, 1976). Previously, the Act allowed for class action recovery of the lesser of \$100,000 or one percent of the creditor's net worth. 15 U.S.C. § 1691e(c) (Supp. V, 1975).

<sup>16</sup>*Id.* §§ 1601-91e.

<sup>17</sup>Pub. L. No. 94-240 (Mar. 23, 1976).

<sup>18</sup>S. REP. No. 590, 94th Cong., 2d Sess. 1 (1976).

<sup>19</sup>15 U.S.C.A. § 1667 (Supp. 2, 1976).

consumer items such as automobiles, television sets, and other large appliances. Disclosures required by the Act include the following: identification of the leased property, the amount of any down payment or security charge, the amount of any incidental fees payable by the lessee, the number, amount, and due dates of periodic payments and the total amount of these payments, a description of insurance requirements, and the amount of any security interest to be retained by the lessor.<sup>20</sup> These disclosures must be made before the lease is signed and can be made in the lease document itself. The civil liability imposed upon a non-complying lessor by this Act is the same as that imposed by the Truth in Lending Act,<sup>21</sup> including both actual damages and twice the amount of any finance charge paid.

### 3. Consumer Goods Pricing Act of 1975

The purpose of the Consumer Goods Pricing Act of 1975<sup>22</sup> is to repeal the federal antitrust exemptions which permitted the states to enact fair trade laws. Fair trade laws allowed manufacturers to require retailers to resell goods at prices set by the manufacturers.<sup>23</sup> Typically the manufacturer entered into a contractual agreement with a retailer whereby the manufacturer set a minimum or stipulated price at which his product could be sold. In 1931 California became the first state to pass a fair trade law and other states followed.<sup>24</sup> However, it was apparent that any such state law which applied to interstate commerce violated federal antitrust laws. This inconsistency was eliminated in 1937 when Congress passed the Miller-Tydings Act,<sup>25</sup> granting state fair trade laws an exemption from the Sherman Antitrust Act.<sup>26</sup>

After the various state fair trade laws went into effect, some manufacturers attempted to set resale prices not only for retailers who had signed fair trade contracts, but also for retailers who had not signed contracts. In *Schwegmann Bros. v. Calvert*

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<sup>20</sup>*Id.* § 1667a.

<sup>21</sup>*Id.* § 1667d. The Truth in Lending Act provides for recoveries equal to any actual damages sustained plus twice the amount of any finance charge and reasonable attorney's fees. There is also a provision for class action recovery. 15 U.S.C. § 1640(a) (Supp. V, 1975).

<sup>22</sup>Pub. L. No. 94-145 (Dec. 12, 1975).

<sup>23</sup>It should be noted that repeal of the fair trade laws will not affect the use of suggested prices by manufacturers, unless suggested prices are used to coerce adherence.

<sup>24</sup>Indiana enacted its Fair Trade Law in 1937. IND. CODE §§ 24-3-1-1 to -8 (Burns 1974).

<sup>25</sup>15 U.S.C. 1 (1970).

<sup>26</sup>*Id.*

*Distillers Corp.*<sup>27</sup> the United States Supreme Court ruled this practice illegal. Congress responded by passing the McGuire Act,<sup>28</sup> which allowed the states to pass fair trade laws with nonsigner clauses.<sup>29</sup> This, in effect, permitted a manufacturer to set resale prices on his goods for all retailers, although a fair trade contract could be enforced against a nonsigner only if the manufacturer could produce a fair trade contract signed by at least one retailer.

It appears that Congress intended enactment of the Consumer Goods Pricing Act of 1975 to lower prices of consumer goods and thereby to help curb inflation. The Department of Justice estimated that passage of the bill would save the public \$1.2 billion per year because fair trade laws had increased prices on fair traded goods by about twenty percent.<sup>30</sup> Primary opposition to passage of the Consumer Goods Pricing Act came from service-oriented manufacturers and small business groups. Several manufacturers feared that retailers would be reluctant to provide adequate service for their goods without a large guaranteed profit. This would appear to be a minor difficulty, since the manufacturer is in a position to control the distributors who handle his goods and thereby guarantee adequate service. Small business groups were concerned that repeal of fair trade laws might lead to vicious price-cutting, placing the smaller business at a distinct disadvantage. Although this appears to be a greater cause for alarm, Library of Congress statistics suggest the fear is unwarranted.<sup>31</sup>

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<sup>27</sup>341 U.S. 384 (1951).

<sup>28</sup>15 U.S.C. § 45 (1970).

<sup>29</sup>The following 13 states enacted fair trade laws with nonsigner provisions: Arizona, California, Connecticut, Delaware, Illinois, Maryland, New Hampshire, New Jersey, New York, Ohio, Tennessee, Virginia, and Wisconsin. 89 Stat. 1570. The following 23 states enacted fair trade laws without nonsigner provisions; Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Washington, and West Virginia. 89 Stat. 1570. Indiana did enact a nonsigner provision as part of its Fair Trade Law [IND. CODE § 24-3-1-6 (Burns 1974)]. However, in 1957 the Indiana Supreme Court declared this provision unconstitutional on the ground that the statute was broad enough to vest a legislative power to fix prices in private persons. *Bissell Carpet Sweeper Co. v. Shane Co.*, 237 Ind. 188, 143 N.E.2d 415 (1957). The court reached this decision despite a previous finding in federal court that the statute was constitutional under both the United States Constitution and the Indiana Constitution. *Sherwin Williams Co. v. Bargain Barn*, 152 F. Supp. 222 (S.D. Ind. 1954).

<sup>30</sup>S. REP. NO. 466, 94th Cong., 1st Sess. 6 (1975).

<sup>31</sup>In 1972, states with fair trade laws with nonsigner provisions had a business failure rate of 35.9 failures per 10,000 firms. In fair trade states without the nonsigner provision the rate was 32.2 per 10,000, and in free trade

Although the Consumer Goods Pricing Act will not affect prices of all goods, it should affect the following types of goods: major appliances, television sets, stereo record players, watches, jewelry, some types of clothing, liquor, and prescription drugs.<sup>32</sup>

Federal amendments to the Equal Credit Opportunity Act, the new Consumer Leasing Act, and even the Consumer Goods Pricing Act are evidence of Congressional intent to strengthen the protections afforded consumers. This Congressional trend, apparent for several years, may be expected to continue until the consumer appears adequately protected from possible abuse.

The Indiana General Assembly also passed an act affecting consumer affairs during the past year. Public Law 154 granted \$90,000 to the Indiana Department of Public Instruction to be used for the development of guidelines, curricular materials, and workshops to train teachers for classes in consumer rights and free enterprise economics in the state public school system.<sup>33</sup>

### B. Case Law Developments

Consumer rights were significantly enhanced on February 2, 1976, when Federal Judge Sharp handed down his landmark decision in *Guernsey v. Rich Plan of the Midwest*.<sup>34</sup> Plaintiffs' complaint, alleging violation of the Federal Trade Commission Act (FTC Act)<sup>35</sup> charged in the first count that the plaintiffs were victimized by defendants' unfair and deceptive acts and practices in violation of a section of the FTC Act.<sup>36</sup> The defendant moved to dismiss this count, alleging that the FTC Act has no provision for private enforcement, since the Commission has original jurisdiction over all complaints.<sup>37</sup> In holding that the plaintiffs had

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states the rate was 23.3 per 10,000. S. REP. NO. 466, 94th Cong., 1st Sess. 3 (1975).

<sup>32</sup>It should be noted, however, that liquor manufacturers will still be able to enforce stipulated resale prices in states which pass price-fixing statutes pursuant to the twenty-first amendment. See IND. CODE §§ 7.1-1-1 to 7.1-5-11-16 (Burns Supp. 1976).

<sup>33</sup>This Act became effective July 1, 1976. Unfortunately, it expires July 1, 1977. Act of Feb. 26, 1976, Pub. L. No. 154, 1976 Ind. Acts 911.

<sup>34</sup>408 F. Supp. 582 (N.D. Ind. 1976).

<sup>35</sup>15 U.S.C. §§ 41-58 (1970). The plaintiffs also alleged violations of the following: 15 U.S.C. §§ 2, 77a-77b (1970), 15 U.S.C. § 1640 (Supp. V, 1975), the torts of fraud and misrepresentation, and the Indiana Deceptive Sales Practices Act, IND. CODE § 26-1-2-313 (Burns 1974). 408 F. Supp. at 585. It should also be noted that suit was filed after a cease and desist order had been issued and after defendant had allegedly violated the order.

<sup>36</sup>15 U.S.C. § 45 (1970). 408 F. Supp. at 585.

<sup>37</sup>*Id.* at 586. See *La Salle Street Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968).

stated a cause of action pursuant to 15 U.S.C. § 45(a)(1),<sup>38</sup> the court stated that the FTC does not have exclusive jurisdiction for enforcement of the FTC Act and that to hold that it does would frustrate the legislative intent of the Act.<sup>39</sup> The court reasoned that if the FTC were to have exclusive jurisdiction, a private consumer who was victimized by a deceptive practice would, in effect, be denied recovery.<sup>40</sup> On the other hand, allowing a private cause of action does not diminish the FTC's role in enforcing the Act.<sup>41</sup> The case thus establishes a private consumer's right to sue a defendant allegedly guilty of using a deceptive practice pursuant to provisions of the FTC Act.

In *Barnes v. Mac Brown & Co.*,<sup>42</sup> the Indiana Supreme Court held that a builder-vendor's implied warranty of fitness for habitation, as developed in *Theis v. Heuer*,<sup>43</sup> extends not only to the first purchaser of a dwelling house, but also to a subsequent purchaser who is damaged by a latent defect.<sup>44</sup> The case arose when the plaintiff, a second purchaser of a house, discovered that his basement leaked because of a crack around three of the basement walls, and sued the defendant builder.

It is interesting to note that the supreme court applied the "logic" developed in products liability-personal injury cases in reaching a decision about a real property-economic loss situation.<sup>45</sup> The court, in a relatively short and simple opinion, has drastically affected the law concerning sale of homes to the public. However, it is not clear at this time what ramifications this development may have in the consumer law area.<sup>46</sup>

In 1974 the First District Court of Appeals of Indiana, in the case of *Vernon Fire & Casualty Insurance Co. v. Sharp*,<sup>47</sup> upheld an award of punitive damages in a breach of contract action involving the bad faith failure of an insurance company to honor

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<sup>38</sup>*Contra*, *Holloway v. Bristol-Myers*, 485 F.2d 986 (D.C. Cir. 1973).

<sup>39</sup>408 F. Supp. at 588.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>342 N.E.2d 619 (Ind. 1976). For discussion of this case by another author see Polston, *Property, infra*.

<sup>43</sup>270 N.E.2d 764 (Ind. Ct. App. 1971), *transfer granted and opinion adopted*, 280 N.E.2d 300 (Ind. 1972).

<sup>44</sup>342 N.E.2d at 620.

<sup>45</sup>*Id.* at 620-21. The court cited, in addition to *Theis v. Heuer*, J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964) and *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), two products liability-personal injury cases.

<sup>46</sup>A significant step in the development of Indiana law in this area is *Old Town Development Co. v. Langford*, 349 N.E.2d 744 (Ind. Ct. App. 1976), a case which postdates the period of this survey.

<sup>47</sup>316 N.E.2d 381 (Ind. Ct. App. 1974).



a claim.<sup>48</sup> This decision appeared to reverse the long-standing rule requiring proof of an independent intentional tort before allowing recovery of punitive damages.<sup>49</sup>

On June 10, 1976, the Indiana Supreme Court affirmed the court of appeals decision on the issue of punitive damages.<sup>50</sup> The supreme court held that "the public policy of this State permits the recovery of punitive damages under the circumstances of this case."<sup>51</sup> However, the holding was tempered by an observation that there was ample evidence in the record to support a finding of the tort of fraud.<sup>52</sup> It therefore remains to be seen whether the Indiana Supreme Court will continue to require proof of an independent tort before allowing recovery of punitive damages in a contract case.

The Court of Appeals for the First District delivered an important opinion for consumers this year in *Jones v. Abriani*.<sup>53</sup> The decision, written by Judge Lowdermilk,<sup>54</sup> carefully reviewed the judicial options available to the purchaser of a defective product and resolved some questions concerning punitive damages in contract cases. The case arose when plaintiffs purchased a defective mobile home from defendants. At the time of purchase, plaintiffs gave defendants a \$1,000 down payment. At delivery it was obvious that several items were defective and within a short time almost everything in the trailer, including the kitchen sink, showed a defect.<sup>55</sup> Plaintiffs stated that they did not want the home in the condition delivered, but defendants replied that if they did not take the home the down payment would be forfeited. Plaintiffs moved into the home on condition that the defects would be fixed. After numerous attempts to have the defects repaired or the items replaced, plaintiffs brought suit.

The court of appeals concluded that, although the theory relied upon by the trial court in granting relief to the plaintiffs

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<sup>48</sup>See Whaley, *Consumer Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 118, 131 (1975).

<sup>49</sup>*Physicians Mutual Ins. Co. v. Savage*, 296 N.E.2d 165 (Ind. Ct. App. 1973).

<sup>50</sup>*Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976). This case is also discussed in Bepko, *Contracts & Commercial Law, infra* and Frandsen, *Insurance, infra*.

<sup>51</sup>349 N.E.2d at 185.

<sup>52</sup>*Id.* at 184.

<sup>53</sup>350 N.E.2d 635 (Ind. Ct. App. 1976), also discussed in Bepko, *Contracts and Commercial Law*. A petition to transfer has been filed in this case.

<sup>54</sup>Robertson, C.J., and Lybrook, J., concurred.

<sup>55</sup>350 N.E.2d at 639. Among defects listed were the following: a chipped sink, a missing curtain, a missing shutter, a floor plan different from the one ordered, a leak in the roof, crooked doors, a broken chair, a gas leak in the furnace, and defective carpeting.

was not clear, four separate grounds for relief were adequately supported by the evidence. These were: refusal of the defendants to recognize a valid rejection, refusal to recognize a rightful revocation of acceptance, breach of an express warranty, and breach of an implied warranty of merchantability.<sup>56</sup>

In regard to the valid rejection of the goods, the court noted that the sellers were not justified in threatening to withhold the down payment if the plaintiffs refused to take possession of the home.<sup>57</sup> The court also held that use of the mobile home by the plaintiffs did not cancel the initial rejection of the defective product, because the use was the result of oppressive conduct by the defendants.<sup>58</sup> This result was reached despite the language found in section 2-602(2) (a) of the Uniform Commercial Code: "[A]fter rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller,"<sup>59</sup> and in spite of many decisions holding that use of goods after a valid rejection turns the rejection into an acceptance.<sup>60</sup>

The issue of punitive damages in a contract case was also discussed in *Abriani*.<sup>61</sup> The trial judge had awarded the plaintiffs \$3,000 in punitive damages. In affirming this result, the court extended the recovery of punitive damages in contract cases beyond insurance company defendants or cases in which an independent tort of fraud is proved. Specifically, the court stated that punitive damages may be granted in a contract case (1) when the evidence shows fraudulent and oppressive action by the defendant, even though those do not establish all the elements of the tort of fraud, and (2) when punitive damages will deter future wrongful conduct and thereby serve the public interest.<sup>62</sup>

The importance of this case to consumers was emphasized by the court when it stated: "In fact, it is hard to imagine where the public interest to be served is more important than in consumer matters, especially where the consumer is in an inferior bargaining position and forced to either sign an adhesion contract or do without the item desired."<sup>63</sup>

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<sup>56</sup>*Id.* at 645.

<sup>57</sup>*Id.* at 643.

<sup>58</sup>*Id.* at 644.

<sup>59</sup>IND. CODE § 26-1-2-602(2) (a) (Burns 1974).

<sup>60</sup>350 N.E.2d at 644. The court did add, however, that the seller could show damages as the result of any wrongful use by the buyers.

<sup>61</sup>For other recent cases dealing with this problem, see *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173 (Ind. 1976); *Hibschman Pontiac, Inc. v. Batchelor*, 340 N.E.2d 377 (Ind. Ct. App. 1976); *Rex Insurance Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975).

<sup>62</sup>350 N.E.2d at 650. Of course, punitive damages are always available if the tort of fraud is proved.

<sup>63</sup>*Id.*

## VII. Contracts and Commercial Law

*Gerald L. Bepko\**

During the past year there were several significant developments in commercial law, including state court decisions, federal court decisions, and federal trade regulation. The following discussion is a cursory review of some of the most interesting of those developments; it begins with a description of the development and application of the Federal Trade Commission's (FTC's) rule on preservation of defenses.

### *A. FTC Rule on Preservation of Consumer Defenses*

The legal system has provided various mechanisms by which consumers can be prevented from raising claims or defenses against the party which finances a consumer sale transaction. First, the doctrine of holder in due course can prevent the maker of a promissory note from raising defenses against the holder, such as fraud or breach of warranty, which he would have been able to assert against a seller in whose favor the note was originally drawn.<sup>1</sup> Secondly, waiver of defense clauses have been enforced.<sup>2</sup> These clauses generally stipulate that the consumer understands that the retail credit contract right will be assigned by the seller to a financier and that the consumer will not raise any claims or defenses based on the underlying sale in any action brought by the assignee. Finally, consumer defenses have been cut off in related loan transactions, in which the consumer borrows money directly from the financier and uses the proceeds of the loan to purchase the goods or services. If the lender and seller are related by agreement or ownership and combine to finance consumer purchases on a regular basis, the transaction is functionally similar to one in which a negotiable instrument or a waiver of defense provision is used. Only the formalities differ. Of course, if the financier simply lends money, and does not sell goods or services, claims or

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<sup>1</sup>IND. CODE § 26-1-3-305 (Burns 1974).

<sup>2</sup>*Id.* § 26-1-9-206.

defenses which might arise in the sale transaction would be irrelevant in a suit to collect the proceeds of the loan.<sup>3</sup>

There has been dissatisfaction with the result produced by these mechanisms. Consumers who are forced to pay for goods or services which prove to be defective or which have been misrepresented to them are the object of much sympathy. It is argued that consumers should not be required to pay unless they obtain the goods or services for which they bargained, and that consumers often do not understand that they will bear the risk of seller misconduct and will be unable to withhold payment if the seller defaults.<sup>4</sup> In addition, the consumer is not in a good position to estimate the risks he bears when he purchases on credit by a contract that cuts off his defenses against a third party financier. Consumers cannot accurately estimate the likelihood of seller default or unavailability, or the costs involved in the event of a default; these costs, in general, can be estimated more readily by the financier.<sup>5</sup> Also, the financier is in a better position to prevent seller misconduct by policing the system through which it finances consumer transactions. Finally, there have been cases in which fraudulent schemes may have been furthered by cutoff mechanisms and it is argued that the mechanisms should be eliminated or modified to prevent that possibility.

Dissatisfaction with cutoff mechanisms has stimulated activity on at least two fronts. First, there are judicial decisions in some states which deny enforcement of some of these mechanisms.<sup>6</sup> For example, courts have refused to apply the holder in due course doctrine where there is a "close connection" between the financier

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<sup>3</sup>There is a fourth common method by which a consumer's claims or defenses can be cut off by a financing device—the credit card transaction. In this transaction the credit card issuer (the financier) issues a credit card to a consumer. In the contract by which this credit card is issued the consumer agrees to seek redress for any grievances directly against the merchant from whom he purchased goods or services and not to raise these grievances in any suit brought by the credit card issuer. This device has been restricted by the 1974 amendments to the Consumer Credit Protection Act. The contract provision limiting the consumer's right to raise defenses is now enforceable only if a purchase takes place more than 100 miles away and in a state other than the one in which the consumer has his mailing address, or if the transaction is for less than \$50. 15 U.S.C. § 1666i(a) (Supp. V. 1975).

<sup>4</sup>See Federal Trade Commission Statement of Basis and Purpose, 40 Fed. Reg. 53,506, 53,523 (1975) [hereinafter cited as FTC Statement].

<sup>5</sup>For an excellent discussion of this subject, see Schwartz, *Optimality and the Cutoff of Defenses Against Financiers of Consumer Sales*, 15 B.C. IND. & COM. L. REV. 499 (1974).

<sup>6</sup>The most heralded and widely read case on this subject is *Unico v. Owen*, 50 N.J. 101, 232 A.2d 405 (1967).

and seller.<sup>7</sup> In doctrinal terms, this is based on a finding that there is no good faith transfer of the note, or that the consumer has actually dealt with the financier through its agent, the seller. In addition, courts have held that waiver of defense clauses are unconscionable and have refused to enforce them where there is this "close connection."<sup>8</sup> Secondly, there have been legislative responses in some states to the consumer's plight. For example, in Indiana, the Uniform Consumer Credit Code (UCCC)<sup>9</sup> has been adopted; it deals with cutoff mechanisms in two ways. Section 2-403<sup>10</sup> provides that in a consumer credit sale a seller "may not take a negotiable instrument other than a check." If, in violation of this provision, a negotiable instrument is taken in a consumer credit transaction, it is unlikely that the instrument could be transferred to a person who qualifies as a holder in due course, since a holder with notice that the instrument has been issued in violation of the section cannot be a holder in good faith.<sup>11</sup> The version of section 2-404<sup>12</sup> of the UCCC adopted in Indiana places substantial restrictions on the use of waiver of defense clauses. It requires the financier which seeks to employ a waiver of defense provision to give notice of an assignment to the consumer. The notice must state, among other things, that the consumer will lose the right to raise defenses if he does not notify the financier of any defense within sixty days of the mailing of the notice of assignment. With respect to defenses which arise during this sixty-day period and which the consumer does not report to the financier the waiver of defense clause can be enforced. Defenses which arise after the sixty-day notice period has expired are preserved for the consumer. The waiver of defense clause is completely unenforceable in cases in which retailer and financier are "related."<sup>13</sup> Unlike the doctrine of holder in due course and waiver of defense clauses, the third cutoff device—the related loan—has not been the subject of much reform activity.<sup>14</sup> In fact there is some evidence that there has been an increase in volume of related loans where the other two devices have been restricted.<sup>15</sup>

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<sup>7</sup>*Id.* See also J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 479-84 (1972).

<sup>8</sup>*Id.*

<sup>9</sup>IND. CODE §§ 24-4.5-1-101 to -6-203 (Burns 1974).

<sup>10</sup>*Id.* § 24-4.5-2-403.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.* § 24-4.5-2-404.

<sup>13</sup>*Id.*

<sup>14</sup>One such reform took place in Massachusetts. See MASS. ANN. LAWS ch. 255, § 12F (Michie/Law. Co-op Supp. 1975).

<sup>15</sup>FTC Statement, *supra* note 4, 40 Fed. Reg. at 53,514-15.

Against this backdrop, in 1971 the Federal Trade Commission began the process of promulgating a rule to preserve consumer defenses. The original proposed rule was published January 21, 1971, and a revised version of the rule was published January 5, 1973.<sup>16</sup> During the process of developing the final rule, which was published November 14, 1975, the commission produced some 2,250 pages of hearing transcripts and recorded 7,362 pages of written comment. The rule became effective May 14, 1976.<sup>17</sup>

The rule is divided into two parts.<sup>18</sup> The first part deals with the holder in due course doctrine and waiver of defense clauses. It requires sellers to include specified language in consumer credit contract documents which will preserve consumers' defenses. The required language must be printed in the contract in at least ten point boldface type. Failure to include this language constitutes an unfair or deceptive act within the meaning of section 5 of the Federal Trade Commission Act.<sup>19</sup>

The presence of this language will have only slight impact on the rights of consumers in Indiana, since taking negotiable instru-

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<sup>16</sup>*Id.* at 53,506.

<sup>17</sup>*Id.*

<sup>18</sup>The rule provides:

In connection with any sale or lease of goods or services to consumers, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, it is an unfair or deceptive act or practice within the meaning of Section 5 of that Act for a seller, directly or indirectly, to:

(a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

or, (b) Accept, as full or partial payment for such sale or lease, the proceeds of any purchase money loan (as purchase money loan is defined herein), unless any consumer credit contract, made in connection with such purchase money loan contains the following provision in at least ten point, bold face, type:

NOTICE

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICE OBTAINED WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

40 Fed. Reg. 53,506 (1975).

<sup>19</sup>15 U.S.C. § 45 (1970).

ments in consumer transactions has been proscribed by section 2-403 of the UCCC. However, with respect to the use of waiver of defense clauses there may be some impact since waiver of defense clauses seem incompatible with the language mandated by the rule. As a result, those financiers and sellers who used waiver of defense clauses despite their limited efficacy in Indiana, will probably have to change their practices.

The second part of the rule, subsection (b),<sup>20</sup> deals with the related loan transaction. The rule makes it an unfair and deceptive trade practice for a seller to receive the proceeds of a consumer loan made by a related lender unless the contract documents recording the loan transaction include specified language causing the lender to be subject to all the consumer's defenses. Since the related loan device does not appear to have been restricted in Indiana, this part of the rule may have significant impact on consumer rights.

Subsection (b) of the rule applies to loans made by lenders to whom the retailer has *referred* customers or which are *affiliated* with the retailer by *common control, contract or business arrangement*. Common control includes circumstances in which one holding company owns both seller and financier, one shareholder owns both, or there is a parent-subsidiary relationship between financier and seller.<sup>21</sup> The expressions "contract" and "business arrangement" are both defined in the rule.<sup>22</sup> These somewhat overlapping definitions suggest that any continuing relationship between financier and seller which relates to the financing of consumer transactions will create an affiliation. In its guidelines on the rule

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<sup>20</sup>Subsection (b) of the rule applies to purchase money loans, which are defined as follows:

*Purchase money loan.* A cash advance which is received by a consumer in return for a "Finance Charge" within the meaning of the Truth in Lending Act and Regulation Z, which is applied, in whole or substantial part, to a purchase of goods or services from a seller who (1) refers consumers to the creditor or (2) is affiliated with the creditor by common control, contract, or business arrangement.

40 Fed. Reg. 53,506 (1975).

<sup>21</sup>Preservation of Consumers' Claims and Defenses; Statement of Enforcement Policy, Invitation to Comment, 41 Fed. Reg. 34,594 (1976).

<sup>22</sup>The rule provides the following definitions:

*Contract.* Any oral or written agreement, formal or informal, between a creditor and a seller, which contemplates or provides for cooperative or concerted activity in connection with the sale of goods or services to consumers or the financing thereof.

*Business arrangement.* Any understanding, procedure, course of dealing, or arrangement, formal or informal, between a creditor and a seller, in connection with the sale of goods or services to consumers or the financing thereof.

40 Fed. Reg. 53,506 (1975).



the FTC has specified several relationships that will constitute a contract or business arrangement. Among these are: (1) maintaining loan application forms in the seller's place of business; (2) an agreement by the seller to prepare loan forms for the financier; (3) an agreement by the financier to refer customers to the seller's place of business; (4) an agreement by the financier to pay the seller for referrals; (5) an agreement by which the seller agrees to pay the financier for referrals; and (6) participation by the financier in a sales program of the seller.<sup>23</sup> Situations which will not constitute an affiliation are: (1) a relationship created by credit card plan whereby the seller is a member of the plan and the financier is the credit card issuing company; (2) maintenance by seller of a checking account with the financier; (3) a general loan by a financier to seller; (4) commercial lease in which the financier and seller are both parties; and (5) discussion between seller and financier regarding security agreements.<sup>24</sup> The second basis for imposing the notice requirement occurs when the retailer "refers customers to the creditor." The word "refer" means a continuing pattern of sending customers to the lender; simply suggesting that the lender might lend money to the consumer is not a referral which would require notice.<sup>25</sup>

If an affiliation exists between financier and seller, the FTC has indicated that the notice must be included, whether or not that particular consumer was actually sent to the lender by the seller.<sup>26</sup> For example, suppose a consumer borrowed money from a financier and then went to an affiliated seller to make a cash purchase with the loan proceeds. The seller could be acting in violation of the rule, unknowingly, by accepting proceeds of the loan made without the required protective language. In its statement on enforcement policy the FTC has announced that a seller cannot be held responsible if he has no reason to know that the consumer is using purchase money loan proceeds; the seller is under no duty to inquire of every person who makes a cash purchase.<sup>27</sup> However, some circumstances should alert the seller to the possibility that the source of the consumer's funds was a loan from an affiliated lender. For example, if the consumer presented a cashier's check drawn by an affiliated financier the seller would be on notice that the cash payment for goods or services might have been generated by a purchase money loan. Also a jointly

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<sup>23</sup>Preservation of Consumers' Claims and Defenses; Statement of Enforcement Policy, Invitation to Comment, 41 Fed. Reg. 34,594 (1976).

<sup>24</sup>*Id.* at 34,595.

<sup>25</sup>*Id.* at 34,596.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*



payable cashier's check drawn by an affiliated financier might give actual knowledge to a seller that the payment constituted proceeds of a purchase money loan. If the seller is put on notice by receipt of a cashier's check from an affiliated financier the seller must determine directly from the financier whether the loan arrangement contained the requisite language. The seller cannot satisfy the rule's requirements by making an inquiry only of the consumer.<sup>28</sup>

It is clear that if the required language is included in a retail installment sales contract the consumer will have a right to refuse to pay the financier to the extent that there are defenses against the seller. In addition, the required language provides that the financier will be subject to any *claim* which the consumer may have. This means that the financier could be responsible for consequential losses suffered by the consumer. For example, if the consumer was injured because of a defect in the product, he could make a claim against the financing entity for his injuries. However, the required language clearly states that the maximum recovery against the financier will be equal to the amount paid under the agreement. In its staff guidelines the FTC has indicated that this amount includes all moneys paid to the financier and, in a case involving a retail installment sales contract, any down payment made to the seller.<sup>29</sup> A down payment could not be recovered from the financier if the purchase was made, in part, with the proceeds of a purchase money loan.

Finally, problems might arise if financiers or sellers fail to incorporate the required language in contract documents. Of course, parties who fail to protect the consumer with the required language will be in violation of the rule and the Federal Trade Commission, armed with new powers under the Federal Trade Commission Improvement Act,<sup>30</sup> may take action against them. This enforcement effort may have a decisive impact on recalcitrant creditors, but some instances of failure to include the required language could raise difficult questions with respect to consumers' rights. For example, assume that a related financier loaned money to a consumer who in turn purchased goods or services from seller. Assume further that, because of a proceeds check made payable jointly to consumer and seller, seller knew that purchase money loan proceeds were being furnished. It is obvious that this seller has violated the rule. But what of the consumer who seeks at a later time to raise defenses against the

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<sup>28</sup>*Id.*

<sup>29</sup>Guidelines on Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses, 41 Fed. Reg. 20,022 (1976).

<sup>30</sup>Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12 (Supp. V 1975).

financer? Since the required language is not present, it is unlikely that the consumer would be able to raise claims or defenses. If the consumer attempted to raise the violation of the FTC rule in this context he would be confronted with two problems. First, the financer has not violated the rule as it is presently written, since the rule applies only to the seller and not to the related financer.<sup>31</sup> Secondly, even if the related financer were directly affected by the rule the consumer would probably be unable to assert a violation, since the courts have uniformly held that there is no private remedy for violation of Federal Trade Commission rules.<sup>32</sup> The only exception to this principle seems to be *Guernsey v. Rich Plan of the Midwest*,<sup>33</sup> a recent case in the Federal District Court for the Northern District of Indiana, discussed elsewhere in this review.<sup>34</sup> However, in that case, the plaintiff alleged not only that the defendant's conduct violated an FTC rule but that the FTC had earlier entered a cease and desist order with respect to the same conduct. On that basis the district court found that the plaintiff had stated a cause of action by alleging a violation of an FTC rule. *Guernsey* might be distinguishable from cases in which consumers attempt to raise violations of the rule in a lawsuit brought by a financer.

This problem would seem to be less significant in the case of use of a negotiable instrument or a waiver of defense clause. As mentioned earlier, Indiana has, by statute, proscribed the use of negotiable instruments in consumer credit sales.<sup>35</sup> With respect to waiver of defense clauses, a consumer may be able to establish that a financer who became an assignee of a retail installment contract without the required language was not an assignee in good faith, and lack of good faith would prevent enforcement of the waiver of defense clause.

## B. Remedies For Breach of Contract

### 1. Liquidated Damages

In *Mandle v. Owens*<sup>36</sup> the court of appeals had an opportunity to address a problem which may occur with some frequency in real estate contracts. In that case, a written agreement between

<sup>31</sup>The FTC has proposed an amendment to the rule which would make it applicable to lenders and other financers as well as sellers. See 40 Fed. Reg. 53,530.

<sup>32</sup>See, e.g., *Holloway v. Bristol-Meyers Corp.*, 485 F.2d 986 (D.C. Cir. 1973).

<sup>33</sup>408 F. Supp. 582 (N.D. Ind. 1976).

<sup>34</sup>See Gray, *Consumer Law*, *supra* at 147.

<sup>35</sup>IND. CODE § 24-4.5-2-404 (Burns 1974).

<sup>36</sup>330 N.E.2d 362 (Ind. Ct. App. 1975).

buyer and seller provided for a \$300 earnest money deposit. The agreement also provided: "If [the] offer is accepted and if we fail to complete the purchase of the real estate herein mentioned as provided herein, the amount of three hundred (\$300) dollars will be forfeited to you."<sup>37</sup> The earnest money was furnished by check which was cashed a few days after receipt. One week later the buyer repudiated the contract and the seller was forced to incur expenses of more than \$2,000 in reselling the property to another buyer. Seller sued buyer for these expenses and buyer defended on the ground that seller was limited to recovery of the \$300 earnest money. He urged that the quoted clause constituted a liquidated damages agreement, and existed in lieu of all other remedies. After a bench trial the court held for the defendant, concluding that the clause was a liquidated damages agreement since it was a "good faith attempt on the part of the parties to estimate the damages which would probably flow from a breach and is fair and reasonable and was intended by the parties to be the sole remedy in the event of the buyers' breach under the contract."<sup>38</sup> Also, the trial court held that the plaintiffs were estopped from claiming additional damages "by reason of the defendants' failure to perform the contract by accepting and retaining the earnest money deposit and proceeding to enter into a contract of sale for said premises with a third party."<sup>39</sup> The court of appeals reversed this decision and held that the clause was a penalty and not a liquidated damages agreement. It was thus unenforceable and the plaintiff was entitled, on remand, to prove and recover all damages caused by the breach.

The court seems to have based its decision on an inability to determine whether the agreed remedy provision in the writing was to be considered as a penalty or as liquidated damages. Since the written agreement was prepared by the attorney for the buyer, the doubt was resolved against the buyer and the clause was construed as a penalty which was unenforceable. The court found reinforcement for this view in the fact that the damages were not uncertain in this case. The seller proved that the property was resold at a price \$500 lower than the contract price and that he had incurred a broker's fee of \$2,065 in the resale transaction. This proof clearly showed a specific figure which represented the seller's losses and highlighted the arbitrary nature of the \$300 forfeiture clause.<sup>40</sup>

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<sup>37</sup>*Id.* at 363.

<sup>38</sup>*Id.* at 364.

<sup>39</sup>*Id.*

<sup>40</sup>*Id.* at 366.

Although there are various formulations, courts have generally listed two criteria to distinguish a liquidated damages agreement from a penalty. To be an enforceable agreed remedy it must appear (1) that the injury which might result from a breach is uncertain or speculative, and (2) that the liquidated amount is a reasonable estimate of the possible loss. The latter of these two criteria seems to be the one most heavily emphasized.<sup>41</sup> Historically, the test of reasonableness was applied as of the time the contract was formed, and actual injury caused by the breach was not considered. Thus a liquidated damages clause could be enforced even though, in light of actual harm, it provided an unreasonably large recovery and had the effect of a penalty.<sup>42</sup> However, more recently there has been a tendency to test the reasonableness of the estimate both in terms of conditions extant at the time the contract was formed *and* actual harm suffered by the non-breaching party.<sup>43</sup> The draftsmen of the Uniform Commercial Code (UCC) seemed to adopt this approach; the Code's focus is on "anticipated or actual harm" and it provides that a "term fixing unreasonably large liquidated damages is void as a penalty."<sup>44</sup> In *Mandle v. Owens* the court seems to follow this trend, testing the provision in light of actual harm and the certainty with which that harm was proved. It should be noted, however, that the court in this case was dealing with a liquidated figure which was very small compared with actual losses, not an unreasonably large figure.<sup>45</sup>

## 2. Punitive Damages

Indiana courts this year handed down three opinions on the subject of availability of punitive damages in contract actions. In two of these cases a consumer was suing a vendor of goods or services and in one case a small businessman was suing insurance

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<sup>41</sup>J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 232, at 367 (1970). The authors also note that intent of the parties to create a liquidated damages clause will be considered.

<sup>42</sup>*See, e.g.,* *Bethlehem Steel Corp. v. City of Chicago*, 350 F.2d 649 (7th Cir. 1965).

<sup>43</sup>*E.g.,* *Priebe & Sons, Inc. v. United States*, 332 U.S. 407 (1947); *Norwalk Door Closer Co. v. Eagle Block & Screw Co.*, 153 Conn. 681, 220 A.2d 263 (1966).

<sup>44</sup>IND. CODE § 26-1-2-718(1) (Burns 1974). For a recent case interpreting this section of the Uniform Commercial Code, see *Equitable Lumber Corp. v. I.P.A. Land Development Corp.*, 38 N.Y.2d 516, 344 N.E.2d 391, 381 N.Y.S.2d 459 (1976).

<sup>45</sup>There may be another basis for invalidating liquidated damages provisions that are unreasonably small. U.C.C. § 2-718, Comment 1, provides that an unreasonably small amount might be invalidated under the section on unconscionable contracts or clauses. See IND. CODE § 26-1-2-302 (Burns 1974); R. NORDSTROM, *HANDBOOK OF THE LAW OF SALES* § 154, at 272-73 (1970).

companies.<sup>46</sup> In each case the trial court awarded punitive damages. Two of these awards were affirmed on appeal and one was overturned. In *Vernon Fire & Casualty Insurance Co. v. Sharp*,<sup>47</sup> the Indiana Supreme Court affirmed an award of punitive damages against two insurance companies who were accused of refusing to pay an insured's claim in an "intentional and wanton" manner. In *Jones v. Abriani*<sup>48</sup> the court of appeals upheld a punitive damage award against the seller of a mobile home who was accused of misleading the consumer with respect to the consumer's right to reject the home, failing to deliver a warranty booklet on demand which caused a forfeiture of a manufacturer's warranty, and willfully and fraudulently refusing to acknowledge and repair defects in the mobile home. In the third case, *Hibschman Pontiac, Inc. v. Batchelor*<sup>49</sup> the court of appeals overturned an award of punitive damages against an auto dealer who was accused of misconduct in failing to make warranty repairs. The *Hibschman* opinion may be in conflict with the supreme court decision in *Vernon*; a petition for transfer of *Hibschman* is pending, which may result in the supreme court addressing that conflict.<sup>50</sup>

In the *Vernon* case the supreme court found three separate grounds for upholding the award of punitive damages. First, the court found that the trial court's award of punitive damages could have been based on a finding that the insurance companies were guilty of fraud, an independent tort. Many Indiana courts have stated that if the plaintiff establishes an independent intentional tort, such as fraud, a punitive damages award is justified.<sup>51</sup> The fraud in this case was based on the companies' promise to pay the proceeds of the policy, knowing at the time that they had no intention of doing so.<sup>52</sup> This representation was undoubtedly relied upon by the plaintiff. The court stated that "[v]iewed in this manner, plaintiff's evidence establishes the elements of fraud

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<sup>46</sup>A small businessman has been treated as a consumer. See, e.g., *Weaver v. American Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971).

<sup>47</sup>349 N.E.2d 173 (Ind. 1976), *aff'g* 316 N.E.2d 381 (Ind. Ct. App. 1974). This case is also discussed in Gray, *Consumer Law*, *supra*, and Frandsen, *Insurance*, *infra*.

<sup>48</sup>350 N.E.2d 635 (Ind. Ct. App. 1976), also discussed in Gray, *Consumer Law*, *supra*, and Frandsen, *Insurance*, *infra*. A petition to transfer this case to the Indiana Supreme Court is pending.

<sup>49</sup>340 N.E.2d 377 (Ind. Ct. App. 1976) (rehearing denied).

<sup>50</sup>*Id.*

<sup>51</sup>E.g., *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975); *Vernon Fire & Cas. Ins. Co. v. Sharp*, 316 N.E.2d 381 (Ind. Ct. App. 1974); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972).

<sup>52</sup>349 N.E.2d at 184.

...<sup>53</sup> Secondly, plaintiff's complaint charged that the insurance companies acted in an intentional and wanton manner in refusing to pay plaintiff the proceeds of the policies. This allegation was based on the fact that the insurance carriers refused to pay plaintiff's claim until an unrelated claim, filed by plaintiff's plant manager, was settled. Implicit in the insurance companies' refusal to pay was a demand that the plaintiff obtain a settlement agreement from his plant manager in the unrelated claim. The court stated that this evidence was sufficient to justify a finding by the jury that there was "intentional and wanton" conduct, that the insurers dealt with plaintiff's claim "with an 'interested motive' and wrongfully attempted by virtue of their superior position to exact additional consideration from the plaintiff before performing their obligations . . ."<sup>54</sup> Although this evidence did not prove an independent tort, it was held sufficient to establish "a serious intentional wrong" which justified the award of punitive damages.<sup>55</sup> Finally, the court stated that punitive damages were justified because the insurance carriers' attempt to force the plaintiff to settle an unrelated claim before the carriers would pay plaintiff's claim constituted a violation of the statutory scheme in Indiana providing for fixed premium rates and prohibiting carriers from altering the rates by demanding premiums in excess of those established by law.<sup>56</sup>

In the second case upholding a punitive damage award, *Jones v. Abriani*,<sup>57</sup> the trial court found that the seller delivered a substantially defective mobile home to the plaintiff. When plaintiff attempted to reject the mobile home defendant threatened that, despite the defects, plaintiff would lose his \$1,000 deposit if he refused to accept the mobile home. In addition, although plaintiff made repeated demands, the defendant did not deliver the manufacturer's warranty booklet which resulted in forfeiture of the

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<sup>53</sup>*Id.* In his dissent, Justice Prentice criticized this finding of fraud on the ground that the plaintiff did not rely on the alleged misrepresentation of intent. 349 N.E.2d at 193-94. In addition, the court's conclusion that the evidence supported a finding that the insurance companies did not intend to fulfill their promises at the time they made them is subject to some criticism. Generally, promissory fraud is not established simply by showing a breach of the contract. If a promise is followed by an immediate breach, the timing of the breach can be evidence of the promisor's fraudulent state of mind. However, in this case, the breach took place long after the promise had been made and no evidence of the state of mind of the party accused of fraud is apparent in the opinion.

<sup>54</sup>349 N.E.2d at 184.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.* at 185. See IND. CODE § 27-1-22-18 (Burns 1975).

<sup>57</sup>350 N.E.2d 635 (Ind. Ct. App. 1976).

warranty protection provided by the manufacturer, since a warranty registration had to be returned by the consumer within five days of purchase in order to be effective. Finally, the defendant refused to acknowledge defects, and refused to repair acknowledged defects, while at the same time making assurances that the defects would be cured.<sup>58</sup> In sustaining the award of punitive damages the court of appeals emphasized that it is not necessary to prove all the elements of an independent tort in order to establish a basis for punitive damages. Heavy reliance was placed on the second ground in the *Vernon* case, which emphasized the same point. When the defendant's conduct is tortious in nature, but does not fit all the elements of a tort, it nevertheless may be the basis for a punitive damage award if "the public interest will be served by the deterrent effect punitive damages will have upon future conduct of the wrongdoer . . ."<sup>59</sup> The court of appeals found the defendant's conduct in the *Jones* case tortious in nature and held that the public interest would be served by the punitive damage award.<sup>60</sup>

In *Hibschman Pontiac, Inc. v. Batchelor*,<sup>61</sup> the first of the three cases involving this issue decided during the survey year, the court of appeals overturned a punitive damage award. In this case the plaintiff was the purchaser of a lemon automobile which was returned on repeated occasions to the dealer for repair without satisfactory results. In his suit for breach of warranty the plaintiff alleged that certain statements and acts of the defendant auto dealer were made willfully, maliciously, and in wanton disregard of plaintiff's rights. Those statements were attributed to a service manager at Hibschman Pontiac, who apparently informed Batchelor on several occasions that the car was repaired. In each case the car had not been repaired.<sup>62</sup> The court of appeals held that in order to support a punitive damage award the plaintiff must establish all the elements of an independent tort,<sup>63</sup> and that in

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<sup>58</sup>*Id.* at 639-40.

<sup>59</sup>*Id.* at 650, quoting *Vernon Fire & Cas. Ins. Co. v. Sharp*, 349 N.E.2d 173, 180 (Ind. 1976) (emphasis omitted).

<sup>60</sup>In the *Jones* case there may have been proof of actual fraud. When the defendant said that the plaintiff had no right to reject the defective mobile home there may have been a misrepresentation of the law. Generally, a misrepresentation of law is not actionable as fraud. See RESTATEMENT (FIRST) OF CONTRACTS § 474, comment d(1932). However, this may be a case in which the person making the misrepresentation has expert knowledge and is communicating with a person who is entitled to rely on that knowledge. See *id.* § 474(b).

<sup>61</sup>340 N.E.2d 377 (Ind. Ct. App. 1976).

<sup>62</sup>*Id.* at 379, 383.

<sup>63</sup>*Id.* at 380-81.



this case no independent tort was proved. There was no proof of fraud because there was no reliance by plaintiff on the false statement of the service manager. In this connection, the court quoted testimony in which Batchelor admitted that he knew that all the defects had not been repaired when he drove his automobile out of Hibschan's service department.<sup>64</sup>

The court's focus in this case on the necessity of showing reliance, and all the elements of an independent tort, not only is inconsistent with the supreme court's views expressed in *Vernon*, but raises other questions as well. In *Hibschan* the court acknowledged that the principal purpose of a punitive damage award is to deter and punish, rather than to compensate for loss.<sup>65</sup> In light of this purpose, reliance and injury to the plaintiff would seem to be less important than the culpability of the defendant. In addition, it may be that there *was* proof of reliance on the misrepresentations in the *Hibschan* case. In testimony quoted by the court, the plaintiff stated that he had called the service manager from Bethel (presumably Bethel College in Mishawaka) and asked if his car was ready. The service manager said, "[T]he car is all ready to go. We want you to come pick it up."<sup>66</sup> This seems to be one of the misrepresentations proved and Batchelor apparently went to pick up the car thereafter in reliance on it. To the extent that plaintiff traveled from Bethel to defendant's place of business there would seem to be reliance sufficient to complete the elements of the independent tort.

### 3. *Rejection and Revocation of Acceptance*

In the *Jones* case, discussed in the previous section, the Indiana Court of Appeals offered some guidelines on rejection and revocation of acceptance under the Uniform Commercial Code.<sup>67</sup> In *Jones* the defects in the mobile home sold to the plaintiff constituted breaches of express warranties and the implied warranty of merchantability. The court pointed out that, based on these defects, the plaintiff had a right to reject the home under UCC

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<sup>64</sup>*Id.* at 383.

<sup>65</sup>*Id.* at 380.

<sup>66</sup>*Id.* at 383.

<sup>67</sup>The buyer's right to reject for defects in the seller's performance is found in IND. CODE § 26-1-2-601. (Burns 1974). The buyer may cancel the contract after rejection; *id.* § 26-1-2-711. The buyer must furnish notice of his rejection; *id.* § 26-1-2-602. The buyer has responsibilities with respect to goods which have been rejected; *id.* §§ 26-1-2-603, -604. Buyer's conduct may constitute acceptance of the goods, which prevents rejection; *id.* § 26-1-2-606. However, the buyer still may cancel the contract by revoking his acceptance; *id.* § 26-1-2-608.



section 2-601<sup>68</sup> and, presumably, to cancel the contract under UCC section 2-711.<sup>69</sup> The plaintiff was not obligated to make the decision to reject immediately upon discovery of the defects. Instead, a buyer in these circumstances is entitled to "try out" the goods to discover defects for a reasonable time before his retention of the goods will constitute acceptance, and this period may be extended when the seller makes assurances of cure.<sup>70</sup> Generally, after the buyer gives notice of rejection, use of the goods can negate the rejection, constitute an acceptance, and prevent the buyer from cancelling the contract.<sup>71</sup> In the *Jones* case the buyer continued to use the mobile home after notice of rejection had been given, but the court held that this continued use was provoked by the seller's oppressive conduct, including the representation that rejection would result in forfeiture of buyer's down payment.<sup>72</sup> The seller's conduct thus justified the buyer's continued use and the use did not negate buyer's earlier rejection. In addition, the court noted that a buyer who rightfully rejects or revokes acceptance is entitled to control the goods in furtherance of a security interest for the amount of the purchase price paid and any incidental damages incurred.<sup>73</sup> In this case the plaintiff had given a negotiable promissory note for the mobile home<sup>74</sup> and, according to the court, was entitled to control the mobile home until that note was returned. However, use of the mobile home during this period above and beyond simple custody might not be justified by the buyer's security interest.<sup>75</sup> Such use would only be justified, if at all, on the ground that it was necessary to preserve the collateral.<sup>76</sup>

Even if the buyer's conduct after notice of rejection in this case constituted an acceptance of the goods, and negated his rejection, the buyer was still entitled to cancel by revoking his

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<sup>68</sup>*Id.* § 26-1-2-601.

<sup>69</sup>*Id.* § 26-1-2-711(1).

<sup>70</sup>350 N.E.2d at 643. This is consistent with the buyer's right of inspection. See IND. CODE § 26-1-2-513 (Burns 1974).

<sup>71</sup>See Whaley, *Tender, Acceptance, Rejection and Revocation—The UCC's "TARR"-Baby*, 24 DRAKE L. REV. 52, 65-66 (1974).

<sup>72</sup>350 N.E.2d at 644.

<sup>73</sup>*Id.* The buyer's security interest under these circumstances is defined in IND. CODE § 26-1-2-711(3) (Burns 1974).

<sup>74</sup>It should be noted that under present law acceptance of a negotiable promissory note in this transaction would be prohibited by IND. CODE § 24-4.5-2-403 (Burns 1974).

<sup>75</sup>350 N.E.2d at 644.

<sup>76</sup>See *Jorgensen v. Pressnall*, 274 Ore. 285, 545 P.2d 1382 (1976), in which the court held that continued occupancy of a mobile home was the most feasible method of protecting the mobile home from continuing water damage caused by a leaky roof.

acceptance, since all requirements for revocation seem to have been met.<sup>77</sup> The buyer's acts of acceptance were probably induced by the seller's assurances that cure would be forthcoming, and the court found that the nonconformities in the mobile home substantially impaired the value of the home to the plaintiff. Finally, there had been no substantial change in the condition of the mobile home other than changes which resulted from defects present in the home at the time of tender.<sup>78</sup>

One interesting aspect of the *Jones* case is the court's conclusion that the trial court decision on monetary damages could be supported by use of the formula found in UCC section 2-714.<sup>79</sup> This section applies when the buyer has accepted and kept the goods, and clearly is not to be used when the buyer has rightfully rejected or revoked acceptance.<sup>80</sup> The court's decision presumed that the buyer, although he was entitled to do so, did not cancel pursuant to a valid rejection or revocation of acceptance. Therefore, the court's discussion of rejection and revocation of acceptance was either voluntary or primarily related to questions of monetary recovery. There is some indication that it was the latter. In its opinion the court suggests that "grounds for relief were made out on at least four different theories: refusal to recognize a valid rejection; refusal to recognize a rightful revocation of acceptance; breach of express warranty; and breach of implied warranty of merchantability."<sup>81</sup> To the extent the court's decision creates a separate and independent basis for damages based on the seller's refusal to recognize a rejection or revocation of acceptance, the court may have broken new ground. It does not appear that the Uniform Commercial Code drafters provided explicitly for monetary liability under these circumstances. The principal danger for a seller in refusing to recognize a rejection or revocation of acceptance appears in the risk of loss sections of the UCC which shift the risk of loss back to the seller.<sup>82</sup>

#### 4. *Proof of Damages Under UCC Section 2-714*

The court of appeals in *Jones* also provided some standards for proving damages under UCC section 2-714.<sup>83</sup> That section provides that, in general, the measure of recovery is the difference

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<sup>77</sup>The requirements for a revocation of acceptance are found in IND. CODE § 26-1-2-608 (Burns 1974).

<sup>78</sup>350 N.E.2d at 644.

<sup>79</sup>IND. CODE § 26-1-2-714 (Burns 1974).

<sup>80</sup>*Id.* § 26-1-2-711.

<sup>81</sup>350 N.E.2d at 645.

<sup>82</sup>See IND. CODE § 26-1-2-510 (Burns 1974).

<sup>83</sup>IND. CODE § 26-1-2-714 (Burns 1974).

between the value of the goods accepted and the value they would have had if they had been as warranted "unless special circumstances show proximate damages of a different amount." In *Jones*, the only evidence to support the trial court's award of \$5,000 damages was evidence that the cost of repair of the mobile home would be \$3,000 to \$4,000. The court stated that since one of the breached express warranties was a warranty of repair, the proof on the cost of repair would be adequate to support the trial court's judgment, at least to the extent of \$4,000. In addition, the court focused on the language which indicates that in special circumstances proximate damages of a different amount may be shown. In this case the seller's refusal to recognize a rightful rejection or revocation of acceptance and continued assurances of cure were special circumstances which justified using the cost of repair as a measure of recovery for any of the breached warranties.<sup>64</sup>

### C. *Employee Termination*

During the survey year the Indiana Court of Appeals considered four suits by dismissed employees claiming wrongful discharge against former employers.<sup>65</sup> In *Shaw v. S.S. Kresge Co.*,<sup>66</sup> the plaintiff was an employee who had worked for Kresge for about three years. After he was dismissed because of chronic absenteeism and tardiness, Shaw brought suit for breach of the employment agreement. Shaw alleged that Kresge had published a handbook which incorporated the conditions of employment and that the handbook contained a provision which required Kresge to utilize a system of formal warnings and a hearing before dismissing an employee. Shaw claimed that he was not accorded this procedure. In its answer, Kresge admitted that it had furnished the handbook with the provision cited, and that the handbook set forth terms and conditions of the employment relationship. However, Kresge denied that it was obligated to furnish warnings prior to discharging the plaintiff for chronic absenteeism and tardiness since there were other provisions in the handbook which authorized Kresge to terminate an employee without warnings or a hearing and since the relationship was terminable at will. Both

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<sup>64</sup>350 N.E.2d at 646.

<sup>65</sup>In a fifth case, an appeal by an employee whose complaint against the East Chicago School Board had been dismissed, the court of appeals found that the complaint stated a cause of action and reversed. Emphasizing that it did not appear from the complaint itself that plaintiff was precluded from recovery, the court held that a missing allegation would not serve as a basis for dismissal. *Soltes v. School City*, 344 N.E.2d 865 (Ind. Ct. App. 1976).

<sup>66</sup>328 N.E.2d 775 (Ind. Ct. App. 1975).

parties moved for summary judgment and the trial court granted the defendant's motion and entered judgment for Kresge.

The court of appeals affirmed the trial court's decision and held that the employment relationship was terminable at will by either employer or employee, despite the provision in the handbook cited by the plaintiff. Since the employment agreement was terminable at will, the court found a want of mutuality of obligation or consideration and therefore any arrangement between the parties was held unenforceable "in respect of that which remains executory."<sup>87</sup> In addition, the court concluded that there was no basis for a cause of action under the principle found in section 90 of the *Restatement (First) of Contracts*,<sup>88</sup> since the defendant made no promise of employment for any ascertainable period.

Since Kresge admitted that the handbook set forth terms and conditions of Shaw's employment, it constituted part of the contractual relation between the parties. Therefore, the court was required to interpret this writing to determine if it established a contract for permanent employment or was sufficient to cause reliance for which plaintiff might have sued under the principle found in section 90 of the *Restatement*. This interpretation question could be viewed as a question of fact. Moreover, plaintiff submitted an affidavit in which he recited his understanding of language in the handbook and the fact that he had remained in Kresge's employ on the basis of these understandings. This might be viewed as evidence of the commercial setting in which the contract was formed and course of performance, both of which would be relevant in interpreting the writing. To the extent that the interpretation of the writing involved weighing evidence of commercial setting and course of performance, a further fact question is brought into focus, one which would normally be decided by a jury.<sup>89</sup> The existence of these fact questions may have made summary judgment inappropriate.

In a second case, *Town of Highland v. Powell*,<sup>90</sup> the court of appeals was confronted with a question concerning the measure of recovery for a police officer who was dismissed from employ-

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<sup>87</sup>*Id.* at 779.

<sup>88</sup>RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932) provides: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

<sup>89</sup>If the meaning of words in a writing depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence, it is a question for the trier of fact. See RESTATEMENT (SECOND) OF CONTRACTS § 238(2) (1973).

<sup>90</sup>341 N.E.2d 804 (Ind. Ct. App. 1976).

ment without regard for the proper dismissal procedure. The trial court had ordered the officer's reinstatement and directed that the Highland Police Department pay all wages and salary withheld during the period between his termination and reinstatement. On appeal, the town argued that the award should be modified to reflect income which the officer had earned in other employment during his dismissal period. Generally, the measure of recovery for a wrongfully dismissed employee is the salary which would have been paid under the employment contract less any earnings actually generated during the employment period. However, the court of appeals refused to apply this formula and affirmed the award of the trial court, relying on cases decided under a provision of the Cities and Towns Act.<sup>91</sup> That statute provides a procedure for disciplining police or fire department employees of cities and towns covered by the Act, and specifies various grounds for dismissal.<sup>92</sup> If a police officer or fireman is dismissed under this law the officer has a statutory right to appeal to the circuit or superior court of the county in which the city is located within thirty days from the date of decision of the Board of Metropolitan Police Commissioners. If the decision of the board is reversed, the statute requires the city to "pay to the party entitled thereto any salary or wages withheld from such party pending such appeal and to which he or she may be entitled under the judgment of said court."<sup>93</sup> On the basis of this language courts have permitted a recovery of back wages without an offset for money earned in other employment.<sup>94</sup> The court of appeals in *Powell* followed these cases and, finding that the statutory provisions were applicable to the officer's dismissal and that the appeal to the circuit court was effected in a timely manner, the court determined that an offset for wages earned by Powell during his dismissal period was not required.

In *Seco Chemicals v. Stewart*,<sup>95</sup> another question was raised concerning wages earned in substitute employment. In that case the employment agreement provided:

Any violation of the terms of this contract by employer shall render the contract voidable by employee, in which event employee shall have the option to continue working under the terms of the contract or terminate said working relationship and receive as liquidated dam-

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<sup>91</sup>IND. CODE §§ 18-1-1-1 to -24-1 (Burns 1974).

<sup>92</sup>*Id.* § 18-1-11-3.

<sup>93</sup>*Id.*

<sup>94</sup>*Bole v. Civil City of Ligonier*, 242 Ind. 627, 181 N.E.2d 236 (1962); *City of Lebanon v. DeBard*, 110 Ind. App. 79, 37 N.E.2d 718 (1941).

<sup>95</sup>349 N.E.2d 733 (Ind. Ct. App. 1976).

ages the balance due under the remainder of the term of the contract as set out in Section 3(a) of this contract.

After the employee, Stewart, was wrongfully discharged, he worked at three different jobs in other communities during the remainder of the twenty-three-month period covered by the employment agreement. Salary earned in these other jobs was deducted from the total salary remaining due under the breached employment agreement to compute Stewart's recovery in the trial court. This award was based on the principle mentioned above that an employee should recover total salary for the employment period less any amount he could have earned in comparable employment at a similar compensation rate in the same community or less what the employee *actually* earned in *any* substitute employment.<sup>96</sup> The latter amount is deducted for the following reason: when a wrongfully discharged employee fails to find work during the employment period the measure of recovery is simple and direct; he can be put in the position he would have been in had the contract been performed by being given the full salary due under the agreement. However, to the extent that the employee uses the free time made available by the breach to earn money, he has not suffered a loss and can be put in the full performance position by being given the difference between what he earned and what he would have earned under the breached agreement. In either case the employee ends up with the full salary for the employment period.<sup>97</sup>

On appeal the court reversed on the issue of damages. It held that the quoted language constituted a liquidated damages agreement. Since damages were fixed in the agreement, the trial court "should not have included a consideration of what Stewart earned—or could have earned"<sup>98</sup> during the employment period. However, the court did not consider whether the failure of the agreed damage clause to take account of actual earnings in substitute employment prevented it from being a reasonable estimate of anticipated losses, and thus void as a penalty.<sup>99</sup>

In *Kiyose v. Trustees of Indiana University*<sup>100</sup> the court of appeals was asked to address a question concerning the enforceability of an oral contract for lifetime employment. The plaintiff,

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<sup>96</sup>J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 351 (1970).

<sup>97</sup>The court of appeals quoted from 5 CORBIN, *CONTRACTS* § 1039, at 242 (1963), on this subject. 349 N.E.2d at 740.

<sup>98</sup>*Id.* at 741.

<sup>99</sup>The court showed less sympathy for agreed remedies in *Mandle v. Owens*, discussed at text accompanying notes 36-45 *supra*.

<sup>100</sup>333 N.E.2d 886 (Ind. Ct. App. 1975).

a lecturer and student at Indiana University, was told by university officials that if he obtained a Doctor of Philosophy degree in East Asian languages he would be given a permanent faculty appointment. After obtaining the degree in April 1973, he was appointed to the rank of assistant professor. When he was notified that he would not be reappointed for the 1974-75 academic year, plaintiff initiated this action alleging breach of an oral agreement for permanent employment. The trial court sustained defendant's motion to dismiss based on the fifth section of the Statute of Frauds, which provides that no action shall be brought "[u]pon any agreement that is not to be performed within one [1] year . . . unless the promise . . . shall be in writing . . ."<sup>101</sup> The court of appeals reversed on this issue, acknowledging numerous authorities holding that a contract for lifetime employment need not be in writing to be enforceable. The fifth section of the Statute of Frauds has been interpreted to require a writing only if the contract *could not* be performed within one year.<sup>102</sup> In *Kiyose* the plaintiff could have died within one year, which would have constituted complete performance of the lifetime employment contract. Since the contract *could have been performed* within one year, it did not have to be in writing to be enforceable. This suggests the somewhat anomalous situation in which a thirteen-month employment contract for an octogenarian might have to be in writing to be enforceable because it could not be performed within one year, while an oral agreement to hire a healthy young employee for life would be enforceable.

#### D. Broad Form Indemnity

The court of appeals recently heard two cases in which a party was seeking indemnity for injuries caused by its own negligence.<sup>103</sup> In *Vernon Fire & Casualty Insurance Co. v. Graham*,<sup>104</sup>

<sup>101</sup>IND. CODE § 32-2-1-1 (Burns 1973).

<sup>102</sup>333 N.E.2d at 889. The court cited *Frost v. Tarr*, 53 Ind. 390 (1876); *Hurd v. Ball*, 128 Ind. App. 278, 143 N.E.2d 458 (1957); *Holcomb & Hoke Mfg. Co. v. Younge*, 103 Ind. App. 439, 8 N.E.2d 426 (1937).

<sup>103</sup>The 1975 Indiana General Assembly enacted a law declaring broad form indemnity clauses to be void and unenforceable in construction contracts. IND. CODE § 26-2-5-1 (Burns Supp. 1976). However, since the law does not affect agreements which were made before July 1, 1975, it would not affect either of the cases discussed in this section. In addition, the law does not apply to highway construction contracts and thus the *Thomas* case, discussed at text accompanying notes 105-08 *infra*, would not be governed by this new law even though it is a construction contract. And, since the *Graham* case, discussed at text accompanying note 104 *infra*, involved a lease it would not be covered by the new law. See *Bepko, Contracts and Commercial Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 132, 136-38 (1975).

<sup>104</sup>336 N.E.2d 829 (Ind. Ct. App. 1975).



a lessor who had incurred liability for negligence to a third party on leased premises was attempting to obtain indemnification from the lessee. In *Indiana State Highway Commission v. Thomas*,<sup>105</sup> the State of Indiana, which had incurred liability to a worker for negligence on a construction job, was attempting to obtain indemnification from the contractors. In both cases the court affirmed trial court opinions which refused to interpret indemnity agreements to protect against negligence on the part of the party seeking indemnification. In the *Graham* case the court repeated the often-stated principle that contracts which provide indemnification for one's own negligence may be valid, but the agreement must be knowingly and willingly made in order to be enforced. In addition, these provisions are strictly construed and will not be held to require indemnity for loss caused by the negligence of the party seeking indemnification unless the requirement is expressed in clear and unequivocal terms.<sup>106</sup> In the *Thomas* case, which was decided after *Graham*, the court went one step further and held not only that such a clause will be strictly construed, but that general language will never be sufficient to require indemnification for negligence of the party seeking indemnification. The language must specifically mention indemnity against the indemnitee's own negligence.<sup>107</sup> This is justified since "lawyers who specialize in this field are well aware that clauses such as those under consideration in this case demand laborious judicial parsing . . . [and] it is not too much to require them to stop waging verbal duels and to state unmistakably whether or not a contract purports to burden the indemnitor with another's negligence."<sup>108</sup>

#### *E. Conditional Payment Terms in Subcontracts*

In written agreements between general contractors and subcontractors for construction work there is often a conditional payment clause. The clause may provide, for example, that the contractor will pay the subcontractor for the subcontract work "after completion of the work, certification by the architect, and payment by the owner."<sup>109</sup> General contractors have urged that such

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<sup>105</sup>346 N.E.2d 252 (Ind. Ct. App. 1976).

<sup>106</sup>336 N.E.2d at 831.

<sup>107</sup>346 N.E.2d at 260.

<sup>108</sup>*Id.* at 263-64, quoting from *Jordan v. City of New York*, 3 App. Div. 2d 507, 514, 162 N.Y.S.2d 145, 152 (1957), *aff'd*, 5 N.Y.2d 723, 152 N.E.2d 667, 177 N.Y.S.2d 709 (1958).

<sup>109</sup>HANDBOOK FOR SUBCONTRACTORS E-6 (1973). In this handbook, compiled by the Indiana Subcontractors Association, Inc., 4755 Kingsway Drive, Indianapolis, Indiana 46205, the association warns against the use of this clause and suggests that it might result in a contingent right to payment.



clauses create express conditions precedent to the general contractor's obligation to pay. Therefore, if the owner failed to pay the general contractor, or delayed payment for a substantial period, the general would not have to pay the subcontractor, at least until the end of that period of delay. The subcontractor's right to payment would thus be contingent on a variety of circumstances which may be beyond his control and he would bear the risk of the owner's insolvency. Some courts have applied conditional payment clauses in this manner.<sup>110</sup> This year, however, in *Midland Engineering Co. v. John A. Hall Construction Co.*,<sup>111</sup> the United States District Court for the Northern District of Indiana joined other courts in restricting this type of clause. In this case the conditional payment clause provided that the contractor was to make "payment, which the said contractor shall pay to said subcontractor immediately after said material and labor installed by said subcontractor to have been completed, approved by said architect, and final payment received by the contractor . . . ."<sup>112</sup> The owner did not pay the general contractor and no payment was made to the subcontractor for approximately three years. The court held that this provision did not create a perpetual excuse for nonpayment, but simply provided the general contractor with a reasonable time within which to obtain payment from the owner before making payment to the subcontractor.<sup>113</sup> The three-year delay was beyond this reasonable period and payment was due.

In reaching this conclusion the court expressed concern about the effect of a different rule in circumstances such as those presented in the *Midland Engineering* case. In *Midland Engineering* the owner kept a five percent retainage from the general contractor until final payment was due while the general contractor kept a ten percent retainage from the subcontractor. In this situation the general contractor is in the position of holding some of the subcontractor's money until final payment becomes due and, therefore, it may be in the interest of the general contractor to delay payment. The court said that "it would not be inconceivable that a malefic general contractor might intentionally maintain a dispute with the owner which would cause the owner to refuse to make payment; the general contractor could thereby avail himself for several years of funds to which he has no right."<sup>114</sup>

<sup>110</sup>See, e.g., *Mascioni v. I.B. Miller, Inc.*, 261 N.Y. 1, 184 N.E. 473 (1933).

<sup>111</sup>398 F. Supp. 981 (N.D. Ind. 1975).

<sup>112</sup>*Id.* at 993.

<sup>113</sup>The language of the standard form for subcontracts distributed by the American Institute of Architects produces a similar result. See AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor, art. 12.5 (American Institute of Architects, Jan. 1972).

<sup>114</sup>398 F. Supp. at 994.

## VIII. Criminal Law and Procedure

*John B. Wilson, Jr.\**

During the survey period, the area of criminal law and procedure was significantly affected by state and federal judicial decisions and by the passage of the new Indiana Penal Code.<sup>1</sup> The penal code, the first comprehensive revision of substantive criminal law in this state in more than seventy years,<sup>2</sup> is discussed in some detail in another Article in this Survey.<sup>3</sup> This Article will discuss the major judicial decisions and their impact on Indiana law. The discussion is presented in the general order in which the respective issues involved would arise in the various stages of the criminal process, beginning with pretrial issues and continuing with issues pertaining to the trial and post-trial stages.

### A. Search and Seizure

During the past year the United States Supreme Court extended application of the fourth amendment in some cases, but in general the Court's decisions substantially narrowed fourth amendment protections. Several decisions this term were based upon the Court's 1973 landmark opinion in *Almeida-Sanchez v. United States*,<sup>4</sup> which held that a warrantless search of an automobile by a roving Border Patrol violates the fourth amendment's prohibition of unreasonable searches and seizures unless based upon probable cause.

The Supreme Court extended the rule of *Almeida* in *United*

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The author wishes to extend his grateful appreciation to Nan Jacobs for her assistance in the preparation of this article.

<sup>1</sup>Act of Feb. 25, 1976, Ind. Pub. L. No. 148, 1976 Ind. Acts 718. The Code as passed has numerous flaws which must be corrected by the 1977 General Assembly before it can become a useful instrument. An interim study commission has been appointed by the Governor for the purpose of correcting the more salient defects.

<sup>2</sup>The last such revision was the Criminal Law and Procedure Act of 1905, ch. 169, 1905 Ind. Acts 584-757.

<sup>3</sup>Kerr, *Foreword*, *supra* at 1.

<sup>4</sup>413 U.S. 266 (1973). *Almeida* overruled many previous lower court decisions approving routine stops and searches for illegal aliens within a reasonable distance from the United States-Mexico border. See *United States v. Thompson*, 475 F.2d 1359 (5th Cir. 1973); *United States v. Miranda*, 426 F.2d 283 (9th Cir. 1970); *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1960); *Kelly v. United States*, 197 F.2d 162 (5th Cir. 1952).

*States v. Brignoni-Ponce*.<sup>5</sup> In *Brignoni*, a roving Border Patrol stopped an automobile and interrogated the passengers, justifying the stop by the observation that the occupants of the car appeared to be of Mexican descent. The Court held that although a roving Border Patrol stop may be justified on facts that would not constitute probable cause for an arrest, the fourth amendment requires that officers on roving patrol may stop vehicles for investigation "only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion"<sup>6</sup> that a vehicle contains illegal aliens. The mere observation that the occupants of the car appeared to be of Mexican descent, standing alone, was not sufficient to justify such a "reasonable suspicion."

In *United States v. Ortiz*,<sup>7</sup> the Court applied the *Almeida* principle to vehicle searches at fixed traffic checkpoints. The Court rejected the government's argument that the circumstances of searches at fixed checkpoints are so different from those of roving patrols that a different standard should apply, noting that the search of a car in either situation involves a substantial invasion of privacy and that probable cause is an essential prerequisite to the protection of privacy from arbitrary action.

The Court made a substantial shift from this broad application of the exclusionary rule by narrowing its effect in a series of very significant decisions. In *United States v. Peltier*<sup>8</sup> the Court refused to apply *Almeida* retroactively to a case pending on appeal at the time of the *Almeida* decision. In reaching its decision, the Court focused on the functions of the exclusionary rule, to deter illegal governmental activity and to preserve "the imperative of judicial integrity"<sup>9</sup> by preventing the courts from becoming "accomplices in the willful disobedience of a Constitution they are sworn to uphold."<sup>10</sup> The rationale for the *Peltier* decision is that the "imperative of judicial integrity" is not offended when the Border Patrol officers who made searches and seizures prior to the *Almeida* decision were acting in good faith and in compliance with then-existing constitutional norms. Furthermore, the deterrent purpose of the court-made exclusionary rule would not be served by applying it retroactively because the law enforcement officers

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<sup>5</sup>422 U.S. 873 (1975).

<sup>6</sup>*Id.* at 884-86.

<sup>7</sup>422 U.S. 891 (1975).

<sup>8</sup>422 U.S. 531 (1975). The facts in *Peltier* were strikingly similar to those in *Almeida-Sanchez*. The defendant was stopped by a roving border patrol. A search of his vehicle uncovered 270 pounds of marijuana found in the trunk.

<sup>9</sup>*Id.* at 536, quoting from *Elkins v. United States*, 364 U.S. 206, 222 (1960).

<sup>10</sup>*Id.*, quoting from *Elkins v. United States*, 364 U.S. at 223.

neither knew nor should have known that they were acting illegally. Since the then-prevailing law approved the search, the considerations of judicial integrity and deterrence of fourth amendment violations were not of sufficient weight to require the retrospective application of the rule to nullify the search. The Supreme Court affirmed this position in *Bowen v. United States*,<sup>11</sup> relying on *Peltier* and thus setting the stage for further criticism and limitation of the exclusionary rule.

The dissenting opinion of Justices Brennan and Marshall in *Peltier*<sup>12</sup> is noteworthy because it is probably prophetic. The Justices foresee gradual abandonment of the exclusionary rule for all practical purposes, and assert that emphasis is now upon the subjective knowledge and good faith of police officers rather than upon the constitutional principles articulated by the Court. Justice Brennan wrote, "If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it."<sup>13</sup> He decried the "slow strangulation" of the rule.<sup>14</sup>

During the 1975 Supreme Court term the "slow strangulation" continued. In *United States v. Martinez-Fuerte*<sup>15</sup> the Court held that the fourth amendment does not require Border Patrol officers operating at a fixed check point to have either a warrant or a reasonable suspicion that a vehicle contains illegal aliens before stopping the vehicle and conducting a limited interrogation, including requiring the production of papers regarding the occupants' citizenship or immigration status.<sup>16</sup> The decision authorizes a brief detention and a "routine and limited" inquiry into residence status based upon nothing more than unsupported, subjective suspicion. For this purpose, apparent Mexican ancestry is sufficient.<sup>17</sup>

In summary, the status of Border Patrol stops and searches now seems to be as follows: roving patrols must have reasonable

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<sup>11</sup>422 U.S. 916 (1975).

<sup>12</sup>422 U.S. 544 (1975) (Brennan and Marshall, JJ., dissenting).

<sup>13</sup>*Id.* at 561.

<sup>14</sup>*Id.* at 561-62.

<sup>15</sup>96 S. Ct. 3074 (1976).

<sup>16</sup>*Id.* at 3086. The Court noted that such stops entail minimal interference with legitimate traffic and, furthermore, that such checkpoint stops involve little discretionary enforcement activity. *Id.* at 3083.

<sup>17</sup>Justice Brennan, again dissenting, condemned the continuing evisceration of the fourth amendment's protections. He stated,

[T]o permit, as the Court does today, police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of a government . . .

*Id.* at 3092 (Brennan, J., dissenting).

suspicion, based upon something more than apparent Mexican ancestry of the occupants of a car, in order to stop a vehicle, and must have probable cause to conduct a search.<sup>18</sup> However, officers at a fixed traffic checkpoint may stop a vehicle and interrogate the occupants for any reason, including the mere presence of persons of apparent Mexican descent,<sup>19</sup> but they must have probable cause to conduct a search.<sup>20</sup>

The Supreme Court continued to narrow the fourth amendment's protection in eight additional cases. In *Texas v. White*<sup>21</sup> the Court upheld a warrantless search of an automobile in police custody despite the fact that the defendant, who had been arrested for a felony, refused to give his consent to the search. In *United States v. Watson*<sup>22</sup> the Court permitted a warrantless arrest in a public place based upon probable cause that the defendant had previously committed a felony. In *United States v. Santana*,<sup>23</sup> noting that the defendant was not in an area where she had any expectation of privacy, the Court permitted a warrantless arrest for a felony on the defendant's porch. In *United States v. Miller*<sup>24</sup> the Court upheld the validity of a subpoena duces tecum requiring presentation of checks, deposit slips, and other records pertaining to an individual's bank account in the custody of the bank.

In an opinion which could have very significant impact, the Supreme Court in *Stone v. Powell*<sup>25</sup> refused to allow collateral review through federal habeas corpus proceedings of alleged fourth amendment violations if there has been "full and fair litigation" of the issues in state court.<sup>26</sup> Even if a search and seizure violation does in fact exist, the accused's remedy is through direct appeal only. The decision distinguished, or reinterpreted, the Court's land-

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<sup>18</sup>*United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

<sup>19</sup>*United States v. Martinez-Fuerte*, 96 S. Ct. 3074 (1976).

<sup>20</sup>*United States v. Ortiz*, 422 U.S. 891 (1975).

<sup>21</sup>423 U.S. 67 (1975).

<sup>22</sup>423 U.S. 411 (1976).

<sup>23</sup>96 S. Ct. 2406 (1976). The court left unanswered the question of whether a warrant is required for an arrest within the defendant's home. *Id.* at 2411 (Marshall, J., dissenting).

<sup>24</sup>425 U.S. 435 (1976). The court held that the defendant did not have standing to object to the seizure because he could not claim ownership or possession of the papers, since they were business records of the bank. *Id.* at 440-42. *But cf.* *Jones v. United States*, 362 U.S. 257 (1960). Furthermore, the defendant in *Miller* did not have a valid expectation of privacy because the items in controversy were not confidential. 425 U.S. at 442-43.

<sup>25</sup>96 S. Ct. 3037 (1976).

<sup>26</sup>Justice Powell, writing for the majority in *Stone*, first expressed this view in his opinion in *Schneekloth v. Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring).

mark decision in *Mapp v. Ohio*<sup>27</sup> on the ground that *Mapp* was decided on direct review. Although *Mapp* flatly prohibited admission of illegally obtained evidence in state trials, *Stone* in effect holds that this is only a conditional prohibition, depending upon how and in what forum the issue is raised. The majority opinion criticized the deterrent theory which has been the primary justification for the exclusionary rule, noting that there is no empirical evidence that it works, and decided that if the theory has any validity at all, it is at the trial and direct appeal levels only. The Court noted further that the exclusionary rule excludes only real evidence, protecting the guilty, and stated that this result is too costly to a "rational system of criminal justice."<sup>28</sup>

The majority of the Court clearly does not favor the exclusionary rule but seems to fear its total and final abolition, and so continues to chip away at its effectiveness. Continuing the trend, the Court held in *United States v. Janis*<sup>29</sup> that evidence seized by a state officer in violation of the fourth amendment is admissible in a civil proceeding by or against the United States. In *South Dakota v. Opperman*<sup>30</sup> the Court approved routine inventory searches without a warrant of any vehicle towed in for a parking violation. And, finally, in *Andresen v. Maryland*<sup>31</sup> a series of search warrants designating items to be seized and including the phrase "together with other fruits, instrumentalities and evidence of crime at this time unknown"<sup>32</sup> were held to be valid against a claim that they were general warrants. The Court noted that the quoted phrase is always construed as part of a longer sentence pertaining to the specific crime under investigation, and therefore each warrant authorized search and seizure only of evidence relevant to the specific crime. The defendant also contended that the admission into evidence of several files from his law office, seized pursuant to the warrants and containing evidence of the commission of other crimes, was contrary to the Court's holding in *Warden v. Hayden*.<sup>33</sup> The Court distinguished *Warden*, which held that "mere evidence" may be seized only where there is probable cause to believe that the evidence sought would aid in apprehen-

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<sup>27</sup>367 U.S. 643 (1961). *Mapp* held that the exclusionary rule is applicable to the states by means of the due process clause of the fourteenth amendment.

<sup>28</sup>96 S. Ct. at 3050-52. The Court applied a balancing test, weighing the utility of the exclusionary rule against the costs of extending it to collateral review of fourth amendment claims. *Id.* at 3049.

<sup>29</sup>96 S. Ct. 3021 (1976).

<sup>30</sup>96 S. Ct. 3092 (1976).

<sup>31</sup>96 S. Ct. 2737 (1976), also discussed at text accompanying notes 59-61 *infra*.

<sup>32</sup>*Id.* at 2748.

<sup>33</sup>387 U.S. 294 (1967).

sion or conviction for a specified crime, and held that the *Andresen* files disclosed evidence of other crimes which was admissible to show the defendant's general intent and common scheme of fraudulent conduct.

Two recent Indiana cases are worthy of note on the subject of the fourth amendment. In *Stokes v. State*<sup>34</sup> a referee of a city court, who had no authority to make binding orders or decrees in his own right,<sup>35</sup> approved issuance of a search warrant.<sup>36</sup> The Third District Court of Appeals held the warrant invalid because a referee is not one of the judicial officers authorized in Indiana Code section 35-1-6-1(a) to issue search warrants.<sup>37</sup> The court noted that if a written appointment of the referee as judge pro tempore had been entered of record, the warrant would have been valid. This decision is clearly contrary to the spirit of the United States Supreme Court's holding in *United States v. Peltier*.<sup>38</sup> In *Stokes*, although the officers acted in the good faith belief that their actions were lawful and the referee believed that his action was proper, an otherwise valid warrant was struck down because of an unknown defect.

In *Wilson v. State*<sup>39</sup> a shotgun and shells were seized pursuant to a search warrant issued on the basis of an affidavit alleging information seven days old. The Indiana Supreme Court rejected Wilson's contention that the warrant was stale under the principles set forth in *Ashley v. State*.<sup>40</sup> The court distinguished *Ashley*, which involved marijuana, a fungible good less likely to remain intact over a period of time, from *Wilson*, involving a hard good unlikely to change character with the passage of time.

## B. Confessions and Admissions

### 1. Voluntariness

In *Magley v. State*,<sup>41</sup> the Indiana Supreme Court relied on *Burton v. State*<sup>42</sup> to hold that if the voluntary character of a con-

<sup>34</sup>343 N.E.2d 788 (Ind. Ct. App. 1976).

<sup>35</sup>IND. CODE §§ 33-13-10-2, 35-1-6-1(a) (Burns 1975).

<sup>36</sup>The referee was allegedly sitting as judge pro tempore of the Gary City Court on the day in question. However, there was no evidence of any written document certifying his appointment as required by law. IND. R. TR. P. 63(E).

<sup>37</sup>"Justices of the peace, judge of any city court, town court or magistrates court or the judge of any court of record, may issue warrants upon probable cause . . . ." IND. CODE § 35-1-6-1(a) (Burns 1975).

<sup>38</sup>422 U.S. 531 (1975), discussed at text accompanying notes 8-14 *supra*.

<sup>39</sup>333 N.E.2d 755 (Ind. 1975).

<sup>40</sup>251 Ind. 359, 241 N.E.2d 264 (1968).

<sup>41</sup>335 N.E.2d 811 (Ind. 1975).

<sup>42</sup>260 Ind. 94, 292 N.E.2d 790 (1973).



fession is challenged the state must prove voluntariness beyond a reasonable doubt.<sup>43</sup> Thus, the Indiana standard is higher than that established by the United States Supreme Court in *Lego v. Twomey*,<sup>44</sup> requiring only a preponderance of the evidence.<sup>45</sup>

In *Magley* the court also set forth for the first time the specific procedure for testing voluntariness of a confession, calling for a pretrial hearing to determine as a matter of law whether a confession was voluntary. The court further suggested that when a defendant makes an objection at trial to preserve the record, the court should consider this pretrial determination *res judicata* and overrule the objection, thus avoiding a duplicate hearing at trial on the same issue. However, if the defendant alleges he has new evidence to present on the subject he must summarize it for the trial court, which may then summarily overrule the objection if the new evidence is found insufficient to change the result of the pretrial decision. If, from the summary, the court determines that the new matter casts a "reasonable doubt" on the pretrial ruling, the court should hold another hearing outside the presence of the jury. Relitigation of the motion to suppress may be more appropriate when the trial judge did not conduct the pretrial hearing, is unfamiliar with the evidence presented at the earlier hearing, and is therefore less able to weigh the new and old evidence as a whole.

## 2. *Miranda Rights*

The United States Supreme Court is continuing perceptibly to

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<sup>43</sup>335 N.E.2d at 817. The appropriate test to be applied is "whether, looking at all the circumstances, the confession was free and voluntary, and not induced by any violence, threats, promises, or other improper influence." *Id.*, quoting from *Nacoff v. State*, 256 Ind. 97, 267 N.E.2d 165 (1971).

The *Magley* decision is clearly in conflict with a distinct line of Third District Court of Appeals cases following *Lego v. Twomey*, 404 U.S. 477 (1972), and holding that the state has the burden of proving the voluntariness of the confession by a preponderance of the evidence. See *Moreno v. State*, 336 N.E.2d 675 (Ind. Ct. App. 1975); *State v. Cooley*, 319 N.E.2d 868 (Ind. Ct. App. 1974); *Ramirez v. State*, 153 Ind. App. 142, 286 N.E.2d 219 (1972). A careful reading of *Magley* suggests that the supreme court meant to resolve this dispute in favor of the reasonable doubt standard. The court noted parenthetically that the preponderance of the evidence test is applicable in the federal courts, 335 N.E.2d at 817, thus distinguishing the Indiana practice. Hopefully, subsequent opinions by both the Indiana Supreme Court and the Indiana Court of Appeals will clarify this apparent inconsistency. For further discussion on this point, see Kerr, *Criminal Law and Procedure, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 160, 171-72 (1975) [hereinafter cited as Kerr, 1975 Survey].

<sup>44</sup>404 U.S. 477 (1972).

<sup>45</sup>*Magley* was reaffirmed in *Lindsey v. State*, 341 N.E.2d 505 (Ind. 1976).



narrow the application of *Miranda v. Arizona*.<sup>46</sup> According to dissenting Justices Brennan and Marshall in *Michigan v. Mosley*,<sup>47</sup> the Supreme Court is rapidly eroding the constitutional protections established in *Miranda* and the present trend portends the ultimate demise of many fifth amendment rights.<sup>48</sup> In *Mosley* the defendant was arrested for robbery and was advised of his *Miranda* rights. When he refused to discuss the robbery, the questioning stopped. He contended that this refusal precluded the police from any further attempt to question him about any criminal activity. However, subsequently the defendant was again advised of his rights and questioned about a different crime, to which he confessed. The Court held that the second interrogation about a different crime, preceded by full warning and waiver, was proper.<sup>49</sup> The *Mosley* decision leaves unchanged the prohibition of repeated attempts to question the accused about the same crime once he has invoked his right to remain silent.<sup>50</sup>

Another recent Supreme Court decision, *Beckwith v. United States*,<sup>51</sup> held *Miranda* inapplicable to a defendant who was interrogated in his own home by IRS agents who failed to give him the full *Miranda* warnings. He was not in custody, but the focus of suspicion was clearly on him when he made certain inculpatory admissions which were later introduced at trial. On appeal the defendant claimed that the "psychological restraints" imposed on one who is the focus of a criminal investigation "are the functional, and therefore, the legal equivalent of custody."<sup>52</sup> Although the Court agreed that there may be noncustodial circumstances so coercive as to require *Miranda* warnings, the factual context of *Beckwith* could not support the requirement.

The Supreme Court rejected the defendants' claim of fifth amendment privilege against self-incrimination in *Garner v. United*

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<sup>46</sup>384 U.S. 436 (1966).

<sup>47</sup>423 U.S. 96 (1975).

<sup>48</sup>*Id.* at 112 (Brennan, J., dissenting).

<sup>49</sup>When a confession made after a person in custody has decided to remain silent is challenged, its admissibility depends on whether his "right to cut off questioning was scrupulously honored." *Id.* at 104. The Court noted that in this case Mosley's desire to remain silent was honored. Questioning was resumed only after the passage of a significant period of time and after a new set of warnings, and the second interrogation was limited to questions concerning a crime not discussed in the prior interrogation.

<sup>50</sup>See *Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966).

<sup>51</sup>425 U.S. 341 (1976).

<sup>52</sup>*Id.* at 344-45. The Court noted that *Miranda* and the many subsequent decisions interpreting that opinion have stressed the significance of the custodial nature of the interrogation as a factor requiring specific warnings. The elements which led the *Miranda* Court to its decision are simply not present in noncustodial, informal interrogations such as the one in *Beckwith*.

*States*<sup>53</sup> and *United States v. Fisher*.<sup>54</sup> In *Garner*, a nontax criminal prosecution, the government introduced at trial the defendant's income tax returns disclosing his occupation as a professional gambler and his association with certain co-conspirators. The defendant claimed this evidence constituted compulsory self-incrimination because the law required him to file the returns. The Court acknowledged that the fifth amendment privilege is applicable to compelled disclosures on tax returns, but held that the defendant's failure to assert the privilege on the tax return constituted a waiver of the privilege.<sup>55</sup>

In *Fisher* the defendants<sup>56</sup> were attorneys of taxpayers under investigation for violation of federal tax laws. The taxpayers had transferred certain documents relating to their accountants' preparation of tax returns to the attorneys. The IRS served subpoenas duces tecum on the attorneys, and the question raised in each case was whether the subpoenas should be enforced. Both defendants claimed that enforcement would be in violation of the fifth amendment rights of their clients and of the attorney-client privilege. The Court ruled that the fifth amendment did not proscribe the compelled production of incriminating evidence in the case at bar, but applies only when the accused is compelled to make a testimonial communication incriminating himself.<sup>57</sup> The accountants'

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<sup>53</sup>424 U.S. 648 (1976).

<sup>54</sup>425 U.S. 391 (1976).

<sup>55</sup>424 U.S. at 657-58. The Court noted that the *Miranda* rule requiring exclusion of incriminating statements in the absence of a knowing and voluntary waiver of the privilege does not apply in the *Garner* situation, since the rule was adopted to prevent the undue influence inherent in custodial interrogation. *Id.* at 657. This justification does not apply to the case of a taxpayer, who may prepare his return at his leisure with the advice of counsel and without the psychological pressures present in custodial interrogations.

The Court distinguished the cases of *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), which involved criminal prosecutions for failure to file the returns required of gamblers in connection with federal occupational and excise taxes on gambling. In these cases, the United States Supreme Court held that fifth amendment privilege was a defense to the charge of failure to file a return, since disclosures made in connection with payment of the taxes would tend to be incriminating in view of pervasive criminal regulation of gambling activities. 390 U.S. at 48-49; 390 U.S. at 66-67. The *Garner* Court noted that the petitioner was in a different situation, since federal income tax returns are not directed at persons "inherently suspect of criminal activities," 390 U.S. at 39, and therefore do not involve a compulsion to incriminate. 424 U.S. at 657-58.

<sup>56</sup>*Fisher* was a consolidation of *United States v. Fisher*, 500 F.2d 683 (3d Cir. 1974) and *United States v. Kasmir*, 499 F.2d 444 (5th Cir. 1974).

<sup>57</sup>425 U.S. at 396-97. The Court also held that an attorney as an agent of his client may not raise the client's privilege, stating that the privilege "was never intended to permit [a person] to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of

work papers, although incriminating, do not rise to the level of testimonial communication within the protection of the fifth amendment.<sup>58</sup> The Court also found that the attorney-client privilege did not apply, since transferring papers to an attorney invests the documents with no greater protection than if possessed by the taxpayer or someone else.

Finally, in *Andresen v. Maryland*<sup>59</sup> incriminating files were seized pursuant to a valid search warrant from the office of a lawyer who was a suspect in a fraud action, and the defendant claimed that admission of the documents at trial violated his fifth amendment rights. The Court rejected this claim and held that the search of an individual's office for business records, their seizure, and subsequent introduction into evidence do not offend the fifth amendment. Statements to the contrary in previous cases, *Boyd v. United States*<sup>60</sup> and *Hale v. Henkle*,<sup>61</sup> were deemed no longer tenable.

In the case of *Brown v. Illinois*,<sup>62</sup> the Supreme Court, applying fourth amendment principles, struck down a confession which followed complete *Miranda* warnings and waiver. The defendant was arrested without warrant or probable cause in violation of the fourth amendment, and while in illegal custody he was given warnings preceding his confession. The Illinois Supreme Court held that the *Miranda* warnings broke the causal connection between the illegal arrest and the confession and that the confession, given after proper warnings, was purged of the primary taint of the unlawful arrest.<sup>63</sup> The United States Supreme Court disagreed and, holding that *Miranda* warnings by themselves do not attenuate the taint of an unconstitutional arrest, applied the "fruit of the poisonous tree" doctrine of *Wong Sun v. United States*<sup>64</sup> and excluded the confession.

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such person . . . the amendment is limited to a person who shall be compelled in any criminal case to be a witness against himself." *Id.* at 398, quoting from *Couch v. United States*, 409 U.S. 322, 328 (1973) (emphasis in original).

<sup>58</sup>*Id.* at 408-14. It is interesting to note that the Supreme Court in *Garner v. United States*, 424 U.S. 648 (1976), discussed at text accompanying notes 53-55 *supra*, found that the preparation and filing of an income tax return constituted testimony within the meaning of the fifth amendment. "The information revealed in the preparation and filing of an income tax return is, for purposes of Fifth Amendment analysis, the testimony of a 'witness,' as the term is used herein." *Id.* at 656.

<sup>59</sup>96 S. Ct. 2737 (1976), discussed at text accompanying notes 31-33 *supra*.

<sup>60</sup>116 U.S. 616 (1886).

<sup>61</sup>201 U.S. 43 (1906).

<sup>62</sup>422 U.S. 590 (1975).

<sup>63</sup>*People v. Brown*, 56 Ill. 2d 312, 304 N.E.2d 356 (1974).

<sup>64</sup>371 U.S. 471 (1963). Under *Wong Sun*, the appropriate point of inquiry in such cases is "whether, granting establishment of the primary illegality,

The Court did acknowledge, however, that there may be circumstances in which a confession following an illegal arrest could be admissible if it was a product of free will and not directly connected to the arrest. Relying on this language from *Brown*, the Indiana Supreme Court in *Montes v. State*<sup>65</sup> upheld a confession in a similar factual situation. After a murder was committed in a work release center, all of the residents were taken to police headquarters and questioned without warrant or probable cause as to any individual. All residents were given *Miranda* warnings and two confessed. The court held that the confessions were freely and knowingly given under the circumstances, and therefore were "purged of the primary taint"<sup>66</sup> of the defendants' illegal detention at the police station. It should be noted that the defendants were inmates of the work release center and in the custody of the Department of Correction at the time of the interrogation, and the result may have depended on that fact.<sup>67</sup>

In *Pulliam v. State*,<sup>68</sup> the Indiana Supreme Court addressed the question of when during custody the accused's *Miranda* rights attach. The defendant was convicted of armed robbery after a trial in which the court admitted his statement of his age made to the police officer who took routine booking information. Age was a material element of the crime<sup>69</sup> and the statement was admitted

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the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Id.* at 487-88 (citations omitted). *Miranda* warnings in and of themselves are not sufficient to break the causal connection between an illegal arrest and a confession for fourth amendment purposes. *Brown v. Illinois*, 422 U.S. at 602. The Court observed that "if *Miranda* warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the fourth amendment violation, the effect of the exclusionary rule would be substantially diluted." *Id.*

<sup>65</sup>332 N.E.2d 786 (Ind. 1975).

<sup>66</sup>*Id.* at 791.

<sup>67</sup>The appellants were well acquainted with the atmosphere of the jail and knew that their status as inmates would remain unchanged whether or not they made a statement. Thus, the danger of coercion arising out of the custodial situation was not a significant factor in *Montes*. Moreover, no threats were made and there was no evidence that the interrogation was conducted in a manner likely to arouse fear. 332 N.E.2d at 793.

<sup>68</sup>345 N.E.2d 229 (Ind. 1976), also discussed at text accompanying note 141 *supra*.

<sup>69</sup>IND. CODE § 35-12-1-1 (Burns 1975) (repealed effective July 1, 1977, Act of Feb. 25, 1976, Pub. L. No. 148, § 24, 1976 Ind. Acts 815) provides: Any person who being over sixteen [16] years of age, commits or attempts to commit any felony, while armed with any dangerous or deadly weapon, or while any other person is present and aiding or assisting in committing or attempting to commit such felony, is armed with any dangerous or deadly weapon, shall be guilty of a separate felony . . . .

over the objection that the defendant had not first been advised of his *Miranda* rights. The court found that the *Miranda* rule is concerned with protecting a suspect against interrogation of an investigative nature, and that questions relating to routine information necessary for the booking process do not require warnings and waiver. The statement was therefore held admissible.

In *McFarland v. State*<sup>70</sup> the defendant made incriminating statements to a non-police, prosecution witness after he was arrested and in custody, but before he had been given his *Miranda* warnings. The Indiana Supreme Court held that *Miranda* applies to custodial interrogation by law enforcement officers, but not to statements made to private persons, even though made while in police custody.<sup>71</sup>

The supreme court issued an opinion regarding confessions by juveniles in the case of *Hall v. State*,<sup>72</sup> in which the seventeen-year-old defendant was arrested for rape and kidnapping. Before questioning by police, the defendant was confronted by the victim at the police station and confessed to the rape. Later his guardian arrived, *Miranda* warnings were given to both, and the defendant also confessed to a murder. The defendant was convicted of both crimes, but the primary issue on his appeal was the confession to murder. The court criticized the waiver as being improper before the defendant and his guardian had a "meaningful opportunity" to counsel together, held that police pressure had been applied by permitting the first confrontation before the guardian arrived, and excluded the confession to the murder. The court set forth the following guidelines to be observed when obtaining confessions from juveniles: (1) Both the juvenile and his parent or guardian must be advised of his *Miranda* rights; (2) the juvenile must be given the opportunity to consult with his parents, guardian, or attorney regarding the waiver of those rights. This opportunity for consultation must not be a formality, but must have substance,

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<sup>70</sup>336 N.E.2d 824 (Ind. 1975).

<sup>71</sup>*Cf. Lukas v. State*, 330 N.E.2d 767 (Ind. Ct. App. 1975), in which the court held inadmissible a tacit admission made to his stepson while the defendant was incarcerated in Marion County Jail prior to trial. When one is in police custody, one need not deny all accusations when failure to do so would constitute an admission. For a tacit or adoptive admission to be admissible, the prosecution must show that "the charge was heard and understood and that the prevailing circumstances are such that the accused would naturally be expected to deny the charge." *Id.* at 770. The court did not discuss the effect of the *Miranda* rule on the admissibility of such admissions.

For further discussion of *Lukas*, see Marple, *Evidence, infra* at 235. For discussion of cases involving tacit or adoptive admissions, see Kerr, 1975 *Survey, supra* note 43, at 173-74.

<sup>72</sup>346 N.E.2d 584 (Ind. 1976).

which requires meaningful opportunity for the juvenile and his guardian to discuss alternatives. It should be noted that the guardian in *Hall* was not a legal guardian, but merely the defendant's sister, the only available relative. The court, citing *Lewis v. State*,<sup>73</sup> found that the term "guardian" under these circumstances is not limited to a person appointed in a legal proceeding, but includes a "'de facto guardian' who establishes his status by acting in loco parentis."<sup>74</sup> Therefore, if the sister had been given a meaningful opportunity to consult with her brother before the first confrontation, the confession would have been valid.

### C. Discovery

Since the Indiana Supreme Court's landmark decision in *State ex rel. Keller v. Criminal Court*<sup>75</sup> there have been several decisions on criminal discovery, but none specifically expanding, restricting, or clarifying *Keller*.<sup>76</sup> From the general tenor of the issues raised on appeal, it appears that few trial courts have been utilizing their broad discretionary power to order full pretrial discovery. Some trial courts still permit the first discovery of grand jury testimony or witness statements only at trial after a proper foundation has been laid pursuant to the guidelines set forth in *Antrobus v. State*.<sup>77</sup> In two cases decided during the survey period, *Morris v. State*<sup>78</sup> and *Layne v. State*,<sup>79</sup> the Indiana Supreme Court and the First District Court of Appeals affirmed the trial courts' denial of pretrial discovery of witness statements, both citing *Antrobus* as authority

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<sup>73</sup>259 Ind. 431, 288 N.E.2d 138 (1972).

<sup>74</sup>346 N.E.2d at 584.

<sup>75</sup>317 N.E.2d 433 (Ind. 1974). *Keller* held that the state must disclose to the defense, before trial, the identity and statements of prospective prosecution witnesses. For further discussion of the *Keller* opinion, see Kerr, 1975 Survey, *supra* note 43, at 178-79; Note, *Keller, Prosecutorial Discovery and the Privilege Against Self-Incrimination*, 9 IND. L. REV. 623 (1976).

<sup>76</sup>Only three decisions during the past year have cited the *Keller* opinion. None of these cases dealt with *Keller* in any depth; it was generally cited for the proposition that the trial court has broad discretion and flexibility in the area of criminal discovery. See *Owens v. State*, 333 N.E.2d 745 (Ind. 1975); *Keel v. State*, 333 N.E.2d 328 (Ind. Ct. App. 1975); *Collins v. State*, 321 N.E.2d 868 (Ind. Ct. App. 1975).

<sup>77</sup>253 Ind. 420, 254 N.E.2d 873 (1970). Under the rule set forth in *Antrobus*, an adequate foundation is laid when: "(1) The witness whose statement is sought has testified on direct examination; (2) A substantially verbatim transcription of statements made by the witness prior to trial is shown to probably be within the control of the prosecution; and, (3) The statements relate to matters covered in the witness' testimony in the present case." *Id.* at 427, 254 N.E.2d at 876-77.

<sup>78</sup>332 N.E.2d 90 (Ind. 1975), also discussed at text accompanying notes 171-75, 198 *infra*.

<sup>79</sup>329 N.E.2d 619 (Ind. Ct. App. 1975).

and neither discussing the application of *Keller*. *Morris* is interesting because the opinion states that the defendant has a "right" to statements "only *after* the witness has testified on direct examination"<sup>80</sup> and has no right to a transcript of the grand jury proceedings. Since the *Keller* decision discussed "rights" to discovery, the obvious problem is to harmonize *Morris* and *Layne* with *Keller*. The logical and reasonable explanation would be that since the trial court rulings in these cases were made before the *Keller* decision was issued, the higher courts may merely be refusing to give *Keller* retroactive application. On the other hand, it could also be argued that the *Morris* case gives the trial court discretion to decide whether to follow *Keller* and that there would be no error in applying the standards of either *Antrobus* or *Keller*. In other words, arguably *Keller* confers no "rights" to pretrial discovery on either the prosecution or the defense, but gives the trial court discretion to permit discovery, and prescribes the outer limits of a permissible discovery order. This, however, would appear to be the least likely construction in view of the specific language of *Keller*. It is hoped that the Indiana Supreme Court will specifically adopt the first position in future decisions, reaffirming the view that both sides have a right to discovery under *Keller* but giving the right only prospective application.

Probably the most troublesome question raised by the *Keller* decision is the court's use of the term "reciprocal" in relation to discovery rights. Because of the use of this term, some believe that the State's right to discovery must await the defendant's request. This view probably is not correct for several reasons. First, the trial court's order to the parties in *Keller* was clear and unequivocal, explicitly stating that each side had a mutually independent right to discovery. This order was affirmed by the supreme court. Secondly, the term "reciprocal" is defined by a dictionary as something interchanged, and given mutually, or performed by both sides.<sup>81</sup> Therefore, the right to discovery may be reciprocal in nature and still be exercised independently in practice. Thirdly, holding that the prosecutor's right to discovery depends upon the defendant's prior exercise of his right would indicate a return to the sporting theory of justice, a theory completely contrary to the spirit and purpose of open discovery. It would be unfair to the accused because he would be put in the position of having to decide whether to give up his own right to discovery for reasons of strat-

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<sup>80</sup>*Id.* at 93 (emphasis in the original).

<sup>81</sup>"Mutual; done by each to the other; due from each other." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 1417 (11th ed. 1952).



egy. If he elected to give up his rights, there would be no discovery for anyone and the result would be a return to trial by ambush.

On the other hand, if both sides were given independent rights in all cases, information might be exchanged as a matter of course, permitting both sides to deal intelligently with the strengths and weaknesses of their cases and, hopefully, enabling them to negotiate a quality plea agreement or dismissal when appropriate. This salutary result is possible only if discovery rights are unconditional and independent.

The future of criminal discovery is bright. Slowly and gradually, but ultimately, the principals in criminal trials will accept the necessity for quality justice under the law. They will learn that there is still room for good advocacy within the ambit of full disclosure. The credibility or accuracy of the witnesses' testimony is always subject to question, but when each side knows before trial the identity of those witnesses a better determination of their truthfulness and accuracy can be made. The State should reveal its evidence before trial, as should the defense. The defense should vigorously compel the State to prove its case; but not by the use of tricks, games, or "torpedo" strategy. A defendant should not be permitted to await the close of the State's case before deciding upon his defense strategy. He has long been required to advise the prosecutor of an alibi defense<sup>82</sup> before trial in order to prevent surprise at trial, and this same logic should apply to any other defense.

The *Keller* decision may have eliminated the need to file a notice of alibi, because if full disclosure is ordered and the prosecutor fails to request discovery, he has waived his right of notice. The burden is on each side to exercise its right and failure to do so would constitute a waiver. This position finds support in a recent decision by the Second District Court of Appeals, *Buchanan v. State*.<sup>83</sup> Relying on the Indiana Supreme Court's decision in *Dillard v. State*,<sup>84</sup> the court held that by failing to seek compliance with a discovery order the defendant waived his right to full discovery.<sup>85</sup>

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<sup>82</sup>IND. CODE § 35-5-1-1 (Burns 1975), provides:

Whenever a defendant in a criminal case in a court other than that of a justice of the peace shall propose to offer in his defense evidence of alibi, the defendant shall, not less than ten [10] days before the trial of such cause, file and serve upon the prosecuting attorney in such cause a notice in writing of his intention to offer such defense.

The United States Supreme Court affirmed the constitutionality of a similar statute in *Williams v. Florida*, 399 U.S. 78 (1970).

<sup>83</sup>336 N.E.2d 654 (Ind. Ct. App. 1975).

<sup>84</sup>257 Ind. 282, 274 N.E.2d 387 (1971).

<sup>85</sup>336 N.E.2d at 657.



The court noted that a request for a continuance is the appropriate remedy in such cases.<sup>86</sup>

Granting a continuance to the defense in such cases is not always necessary, however. In *Bradberry v. State*,<sup>87</sup> on the morning of trial the prosecutor disclosed the names of two witnesses omitted from the witness list, and the defense moved for a continuance. The trial court denied the continuance, but imposed the following conditions before allowing the witnesses to testify: (1) The state was to furnish to the defense copies of the witnesses' statements containing the substance of their testimony; (2) the defense was permitted to personally interview the witnesses; (3) after reading the statements and conducting the interview the defense could renew its request for a continuance if it found good and substantial reasons to do so. The Second District Court of Appeals held this procedure to be proper and, in the absence of a showing of harm to the defendant, within the discretion of the trial court.

#### D. Jurisdiction—Juvenile Waiver

Waivers of juveniles to courts of criminal jurisdiction continue to come under procedural attack. It is becoming clear that the waiver hearing must be held in the court of juvenile jurisdiction and must in fact be a hearing rather than a perfunctory exercise; that the waiver order must clearly state the reasons for the order based on the facts of each individual case rather than a mere recital on a preprinted form; and that each procedural step must be in sequence and depend upon the proper completion of the step before it.<sup>88</sup> The most recent case on the subject, decided by the Second District Court of Appeals, is *Duvall v. State*.<sup>89</sup> The court held that neither the defendant, his parents, nor his attorney can waive the hearing and request that the case be bound to criminal court. Even if no one concerned wants the hearing, it must still be held. Failure to hold the hearing will result in reversal of the criminal court conviction, and not merely a remand for proper waiver proceedings.

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<sup>86</sup>*Id.* at 656.

<sup>87</sup>328 N.E.2d 472 (Ind. Ct. App. 1975).

<sup>88</sup>*Atkins v. State*, 259 Ind. 596, 290 N.E.2d 441 (1972); *Cartwright v. State*, 344 N.E.2d 83 (Ind. Ct. App. 1976); *Seay v. State*, 337 N.E.2d 489 (Ind. Ct. App. 1975).

<sup>89</sup>353 N.E.2d 478 (Ind. Ct. App. 1976).

### E. Pretrial Proceedings

#### 1. Grand Jury

Since the United States Supreme Court's decision in *Taylor v. Louisiana*<sup>90</sup> held unconstitutional a Louisiana statute which excluded women as a class from jury duty, there have been various reactions and overreactions on the part of the states. Jury commissioners have routinely been criticized for excluding from call all persons who could claim exemptions. The Indiana Supreme Court in *Baum v. State*<sup>91</sup> specifically approved the practice of excluding persons over sixty-five in the grand jury selection process, noting that the exclusion of a particular group is permissible if there is "some logical reason for such exclusion."<sup>92</sup> Presumably, the statutory exemption from jury duty of persons over age sixty-five<sup>93</sup> provides a "logical reason" for exclusion, and this rationale may also apply to other groups exempted from jury duty by statute.<sup>94</sup>

During the past year, both the United States Supreme Court and the Indiana Supreme Court decided cases involving the nature and extent of grand jury investigations and the rights of those subpoenaed to appear before the grand jury. In the Indiana case of *State ex rel. Pollard v. Criminal Court*,<sup>95</sup> the supreme court affirmed a trial court order requiring production of financial records before the grand jury, holding that a subpoena duces tecum may be issued to a prospective grand jury witness and that the fourth amendment prohibition against unreasonable searches and seizures does not apply to such subpoenas. However, the subpoenas may not be issued arbitrarily or in excess of statutory authority, and they must be reasonable in nature. Perhaps of more significance for the present discussion is the fact that the court recognized that the fifth amendment privilege against self-incrimination applies to grand jury proceedings and set forth guidelines enabling a witness to assert that privilege. Pursuant to these guidelines all

<sup>90</sup>419 U.S. 522 (1975).

<sup>91</sup>345 N.E.2d 831 (Ind. 1976), also discussed at text accompanying notes 124-25 *infra*.

<sup>92</sup>*Id.* at 833.

<sup>93</sup>IND. CODE § 33-4-5-7 (Burns 1975) provides, in pertinent part: "Any person shall be excused from acting as a juror who is over sixty-five [65] years of age and desires to be excused for such reason."

<sup>94</sup>The following persons are exempted from jury service by IND. CODE § 33-4-5.5-13 (Burns 1975):

[M]embers in active service of the armed force of the United States, elected or appointed officials of the executive, legislative or judicial branches of government of the United States, state of Indiana, or counties affected by this chapter [33-4-5.5-1—33-4-5.5-22] who are actively engaged in the performance of their official duties.

<sup>95</sup>329 N.E.2d 573 (Ind. 1975).

witnesses before the grand jury must be fully advised of their rights protected by the privilege. A witness summoned to testify before the grand jury must be advised of the general nature of the grand jury investigation. This information, which must be contained in the subpoena,<sup>96</sup> enables a witness who is charged with a criminal offense or who is the subject of the investigation to consult with counsel in order to determine whether or not he should testify.<sup>97</sup> Furthermore, the subpoena must inform the witness of his right to counsel, either retained or appointed. Finally, a witness who is neither charged with a criminal offense nor the subject of the investigation may not assert fifth amendment rights upon his arrival at the grand jury room; rather, he may assert his claim only upon being asked a question which he believes may incriminate him, and the propriety of the claim is to be determined by an *in camera* hearing before the court which convened the grand jury.<sup>98</sup>

In contrast, the United States Supreme Court in *United States v. Mandujano*<sup>99</sup> considering a perjury prosecution based on testimony before the federal grand jury, held that *Miranda* warnings need not be given to grand jury witnesses even when the witness is a "putative" or "virtual" defendant. The Court applied the traditional interpretation of the *Miranda* decision, limiting its application to custodial interrogations, and noted that extending *Miranda* to grand jury investigations would thwart the work of the grand jury. *Miranda* warnings invoke a right to remain silent, and that right does not exist before the grand jury, where witnesses must answer all questions not subject to a valid claim under the fifth amendment. Furthermore, *Miranda's* reference to the sixth amendment right to counsel does not apply in grand jury proceedings, when adversary criminal proceedings have not yet been initiated.<sup>100</sup>

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<sup>96</sup>*Id.* at 589.

<sup>97</sup>An accused who refuses to comply with either a subpoena duces tecum or a subpoena ad testificandum may not be held in contempt. *Id.* at 590.

<sup>98</sup>*Id.* at 590-91. See Kerr, 1975 Survey, *supra* note 43, at 175-76.

<sup>99</sup>96 S. Ct. 1768 (1976).

<sup>100</sup>*Id.* at 1779. However, a witness before the grand jury may consult with counsel *outside* the grand jury room. Apparently an indigent witness would not have this opportunity, since the sixth amendment does not apply. See Kirby v. Illinois, 406 U.S. 682 (1972).

Justices Brennan and Marshall, in their concurring opinion, stated that the plurality opinion "suggests a denigration of the privilege against self-incrimination and the right to the assistance of counsel." 96 S. Ct. at 1781. Observing that grand jury proceedings are subject to fundamental guarantees of liberty, including the fifth amendment privilege against self-incrimination, they held that an individual's only protection before a grand jury is the exercise of this privilege, which cannot be exercised unless the individual is aware of his right. Finally, the concurring justices noted that "ours is an

In summary, both *Pollard* and *Mandujano* recognize the applicability of the fifth amendment privilege against self-incrimination in grand jury proceedings. The Indiana decision requires that the witness be given certain warnings; the United States Supreme Court does not. *Pollard* makes it clear that a witness has a right to counsel but it is not clear at what point this right comes into existence. The witness may consult with his attorney prior to testifying, but the court did not decide whether the witness may seek the advice of counsel during the course of his testimony. *Mandujano* limits consultation to discussions outside the grand jury room and further limits this opportunity to those with the financial resources to hire private counsel.

## 2. Right to Counsel and Probable Cause

Since the Supreme Court's decisions in *Gideon v. Wainwright*<sup>101</sup> and *Argersinger v. Hamlin*<sup>102</sup> establishing the constitutional right to counsel in any case in which the accused may be deprived of liberty, many defendants have attempted to assert that right at probable cause hearings and have also claimed that a probable cause hearing must be adversary in nature. Relying on the Supreme Court's decision in *Gerstein v. Pugh*,<sup>103</sup> the Third District Court of Appeals in *Tinsley v. State*<sup>104</sup> summarily rejected a similar contention, holding that a defendant has neither a constitutional right to an adversary probable cause hearing nor a right to be represented by counsel in such proceedings.<sup>105</sup>

## 3. Bail

In a decision which could have a great impact on bail bond practice in this state, the First District Court of Appeals in *Board of County Commissioners v. Farris*<sup>106</sup> approved a new bail system instituted in Vanderburgh County. The bail schedule and court rules offer the defendant, in addition to the usual forms of bail,

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accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Id.* at 1782, quoting from *Rogers v. Richmond*, 365 U.S. 534, 541 (1961) (Brennan and Marshall, JJ., concurring).

<sup>101</sup>372 U.S. 335 (1963).

<sup>102</sup>407 U.S. 25 (1972).

<sup>103</sup>420 U.S. 103 (1975).

<sup>104</sup>330 N.E.2d 399 (Ind. Ct. App. 1975).

<sup>105</sup>*Id.* at 402. Cf. *Moore v. State*, 312 N.E.2d 485 (Ind. 1975) (A defendant may not raise on appeal denial of counsel at a preliminary hearing unless the absence of counsel in some way resulted in a denial of due process during the defendant's trial).

<sup>106</sup>342 N.E.2d 642 (Ind. Ct. App. 1976).

an option to deposit ten percent of the face amount of the bail with the clerk of the court in order to obtain a conditional release. If the defendant fulfills all conditions until judgment, ninety percent of his cash deposit is returned. Replying to the objection that the amount retained was an illegal court cost, the court of appeals held that the power to set bail procedures is exclusively judicial and includes the power to determine the manner of making bail and to collect administrative fees incurred thereby.<sup>107</sup>

#### 4. Criminal Rule 4—Early Trial

Some confusion has existed regarding the proper application of Criminal Rule 4, which deals with time limits within which a defendant must be brought to trial.<sup>108</sup> There has been uncertainty as to when the time begins to run, what tolls it, and what constitutes delay chargeable to the defendant.

In *State ex rel. Wickliffe v. Judge of Criminal Court*,<sup>109</sup> the Indiana Supreme Court held that a Criminal Rule 4(B)(1) motion<sup>110</sup> for early trial on a felony filed in the Marion County Municipal Court was a nullity because that court has no jurisdiction to try felonies.<sup>111</sup> The early trial motion, in order to have effect, must be filed in the court of jurisdiction *after* it has acquired jurisdiction. Approximately one year later, in an unreported decision, the Indiana Supreme Court dealt with a similar problem under Criminal Rule 4 in the case of *Fowler v. Marion Criminal Court*.<sup>112</sup> The defendant had been released on bond, and thirteen months elapsed before the grand jury returned an indictment. In a hearing on an application for a writ of mandate, the supreme court decided that Criminal Rule 4 does not apply until after the indict-

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<sup>107</sup>*Id.* at 644. A similar bail system was approved by the United States Supreme Court in *Schilb v. Knebel*, 404 U.S. 357 (1971).

<sup>108</sup>In essence the rule provides that no person shall be held to answer a criminal charge for more than one year provided that the delay is not due to actions of the defendant. IND. R. CR. P. 4.

<sup>109</sup>328 N.E.2d 420 (1975).

<sup>110</sup>IND. R. CR. P. 4(B)(1) provides:

Defendant in jail—Motion for early trial. If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy [70] calendar days from the date of such motion, except where a continuance within said period is had on his motion, or the delay is otherwise caused by his act, or where there was not sufficient time to try him during such seventy [70] calendar days because of the congestion of the court calendar. Provided, however, that in the last mentioned circumstance, the prosecuting attorney shall file a timely motion for continuance as set forth in subdivision (A) of this rule.

<sup>111</sup>IND. CODE § 33-6-1-2 (Burns 1975).

<sup>112</sup>CR 75-434D (Marion Co. Crim. Ct. 4, April 26, 1976).

ment is returned and filed in the court of jurisdiction. During the interim before an indictment is filed in the criminal court, a defendant could challenge the delay based on his sixth amendment right to a speedy and public trial.<sup>113</sup>

In *Moreno v. State*<sup>114</sup> the defendant contended that he was entitled to discharge pursuant to Criminal Rule 4 because he was not brought to trial within one year after the last act of delay chargeable to him. Moreno alleged that he had not authorized his attorney to request a continuance and that, therefore, the delay resulting from the continuance should not be chargeable to him. The Third District Court of Appeals rejected this contention, holding that the defendant is chargeable with the acts of his attorney.<sup>115</sup> Even though the attorney agrees to a continuance requested by the state, the delay is chargeable to the defendant.

The Third District Court of Appeals decision in *Tyner v. State*<sup>116</sup> provides a compendium of answers to frequently raised questions regarding Criminal Rule 4. First, the court noted that although the rule provides that delay due to court congestion should be raised by motion of the State, it is proper for the court to note its crowded calendar sua sponte.<sup>117</sup> Secondly, the court held that the rule, specifying time limits more rigorous than required by the constitutional right to speedy trial, does not have constitutional stature. Third, a defendant will be deemed to have waived his right to discharge if he does not object when, during the time limits of the rule, the court schedules a trial date beyond the prescribed period. Finally, the court held that when a defendant requests a trial date within the one year period, but the trial cannot be scheduled within that time limit because of a congested court calendar, strict compliance with the rule is excused. In such cases the defendant may not complain of failure to bring him to trial during the time prior to his request, even if the court's calendar was not congested during that period.<sup>118</sup>

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<sup>113</sup>The right to a speedy trial is fundamental and therefore is imposed by the due process clause of the fourteenth amendment on the States. See *Dickey v. Florida*, 398 U.S. 30 (1970); *Smith v. Hoey*, 393 U.S. 374 (1969). See also *Barker v. Wingo*, 407 U.S. 514 (1972).

<sup>114</sup>336 N.E.2d 675 (Ind. Ct. App. 1975).

<sup>115</sup>*Id.* at 684. See *Holt v. State*, 316 N.E.2d 362 (Ind. 1974); *Eppo v. State*, 244 Ind. 515, 192 N.E.2d 459 (1963); *Ford v. State*, 332 N.E.2d 221 (Ind. Ct. App. 1975); *Collins v. State*, 321 N.E.2d 868 (Ind. Ct. App. 1975).

<sup>116</sup>333 N.E.2d 857 (Ind. Ct. App. 1975).

<sup>117</sup>*Id.* at 859. See *Harris v. State*, 256 Ind. 464, 269 N.E.2d 537 (1971).

<sup>118</sup>*Id.* at 859-60. See *Utterback v. State*, 310 N.E.2d 552 (Ind. 1974); *Bryant v. State*, 261 Ind. 172, 301 N.E.2d 179 (1973).

### 5. Criminal Rule 12—Change of Judge

The automatic right to a change of judge under Criminal Rule 12<sup>119</sup> survived a challenge in *State ex rel. Benjamin v. Criminal Court*.<sup>120</sup> The trial court denied a request for a change of judge upon failure of the defendant to show actual bias or prejudice. The Indiana Supreme Court granted a writ of mandamus, holding that a change of judge must be granted upon the timely filing of an unverified motion and the rule may be changed only by the legislature or by the Indiana Supreme Court on recommendation to the Rules Committee. The Rules Committee met shortly thereafter and declined to change the rule.

#### F. Trial

##### 1. Right to Counsel

In *Faretta v. California*<sup>121</sup> the accused insisted upon representing himself at trial. He demonstrated on the record some knowledge of the law and understanding of the proceedings, but the trial court ruled that he had no right to conduct his own defense and appointed a public defender. The United States Supreme Court held that the sixth amendment guarantees the right of self-representation to a criminal defendant who voluntarily and intelligently waives the right to assistance of counsel. If the state imposes an attorney upon him, it deprives him of his constitutional right to conduct his own defense.

##### 2. Right to Be Present at Trial

In *Brooker v. State*<sup>122</sup> the defendant refused to leave the lock-up and appear at his trial. The trial proceeded. However, before each witness was called the defendant was advised of his right to attend the trial and asked if he wished to appear. He continually refused to attend. The First District Court of Appeals held that under these circumstances the defendant knowingly and voluntarily waived his right to be present at trial. It is doubtful that this opinion would authorize trying *in absentia* a defendant who merely fails to appear for unknown reasons.

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<sup>119</sup>IND. R. CR. P. 12 provides: "In all cases where the venue of a criminal action may now be changed from the judge, such change shall be granted upon the execution and filing of an unverified application therefor by the State of Indiana or by the defendant."

<sup>120</sup>341 N.E.2d 495 (Ind. 1976).

<sup>121</sup>422 U.S. 806 (1975).

<sup>122</sup>342 N.E.2d 886 (Ind. Ct. App. 1976).

### 3. *Presumption of Innocence*

The United States Supreme Court in *Estelle v. Williams*<sup>123</sup> held that an accused may not be compelled to stand trial before a jury while dressed in identifiable prison clothing because to do so would undermine the presumption of innocence. Although the defendant's failure to object negates the compulsion necessary to show a constitutional violation, better practice would suggest that the trial court make a record of the defendant's waiver.

### 4. *Jury Venire and Voir Dire*

The United States Supreme Court in *Taylor v. Louisiana*<sup>124</sup> clearly indicated that systematic exclusion from jury duty of any class based upon race, religion, or sex is unconstitutional. However, the opinion did not determine whether a state may select its prospective jurors solely from those persons who are registered voters, thereby excluding unregistered voters as a class. Since most criminals are probably not registered voters, such an exclusion would operate to deny them a right to be tried by their peers. The Indiana Supreme Court in *Baum v. State*<sup>125</sup> approved of voter registration lists as an acceptable method for selection of prospective jurors, finding no compelling reason to provide an accused with trial by citizens who are not interested in registering to vote.

Since 1973, when the Indiana Supreme Court in *Robinson v. State*<sup>126</sup> admonished trial courts to assume a more active role in controlling abuses of voir dire,<sup>127</sup> the supreme court has decided at least two cases approving more restrictive voir dire methods utilized by trial courts under Trial Rule 47(A).<sup>128</sup> In *Owens v. State*<sup>129</sup> the trial court conducted some voir dire and then allowed each side twenty minutes in which to address the prospective jurors personally. Counsel were then permitted to submit questions to the judge which, if approved, would be posed by him to the

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<sup>123</sup>425 U.S. 501 (1976).

<sup>124</sup>419 U.S. 522 (1975).

<sup>125</sup>345 N.E.2d 831 (Ind. 1976), also discussed at text accompanying notes 91-94 *supra*.

<sup>126</sup>260 Ind. 517, 297 N.E.2d 409 (1973).

<sup>127</sup>See Harvey, *Civil Procedure and Jurisdiction, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 59, 76 (1974).

<sup>128</sup>IND. R. TR. P. 47(A) provides, "The court shall permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by further inquiry."

<sup>129</sup>333 N.E.2d 745 (Ind. 1975).



prospective jurors. In *White v. State*<sup>130</sup> the trial judge conducted the voir dire in its entirety, but permitted counsel to submit written questions to the court for possible submission to the panel. In reaffirming that a trial judge has wide discretion in arranging and conducting voir dire, the supreme court held that both of these methods were proper under Trial Rule 47(A).

### 5. Opening Statements

In *Fleetwood v. State*<sup>131</sup> the prosecutor failed to describe in his opening statement all the evidence he intended to present to establish a prima facie case. The defendant contended that this was a fatal omission under Indiana Code section 35-1-35-1, which requires the prosecuting attorney to "state the case of the prosecution and briefly state the evidence by which he expects to support it . . . ." In rejecting this contention, the First District Court of Appeals held that the primary purpose of the opening statement is not to inform the accused of the nature of the case but to inform the jury of the charges and the contemplated evidence.<sup>132</sup> The court found that *Blume v. State*,<sup>133</sup> which is frequently cited in support of the defendant's contention, in fact held that the scope of the opening statement is within the discretion of the trial court and that only a clear abuse of such discretion is ground for reversal.

### 6. Evidence

*a. Chain of Custody in Drug Prosecutions.*—In *Smith v. State*<sup>134</sup> the First District Court of Appeals clarified many commonly held misconceptions regarding chain of custody in drug prosecutions. The court ruled drugs are admissible as real evidence upon proof of a continuous chain of custody from seizure of the drugs until testing, which may be established by showing the continuous whereabouts of the exhibit under circumstances making tampering unlikely. The drugs themselves need not be put into evidence if there is proof of the nature of the substance by chemical analysis. Finally, the court held that a field test alone may be sufficient to prove that the evidence seized was a controlled sub-

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<sup>130</sup>330 N.E.2d 84 (Ind. 1975).

<sup>131</sup>343 N.E.2d 812 (Ind. Ct. App. 1976).

<sup>132</sup>The court noted that this interpretation of the role of opening statements is logically consistent with the rules of pretrial discovery in Indiana, but acknowledged that the prosecution's opening statement may be improper if it is false and prejudicially misleads the defendant regarding the evidence to be presented at trial. *Id.* at 815.

<sup>133</sup>244 Ind. 121, 189 N.E.2d 568 (1963).

<sup>134</sup>345 N.E.2d 851 (Ind. Ct. App. 1976).

stance and questions concerning validity of the field test go to the weight of the evidence and not to its admissibility.

*b. Common Scheme or Plan.*—It has often been held that evidence of commission of another crime is not admissible at trial unless it is offered to prove a common scheme or plan,<sup>135</sup> identity of the defendant,<sup>136</sup> or intent or motive for committing the crime charged.<sup>137</sup> In *Critchlow v. State*<sup>138</sup> the Indiana Supreme Court held that, in a rape trial, evidence that the defendant committed rape on another victim is admissible under the common scheme or plan exception, even though the other rape was subsequent to the one for which the defendant is being tried.<sup>139</sup>

*c. Exhibits of Physical Evidence.*—The Indiana Supreme Court in *Keiton v. State*<sup>140</sup> required that the state introduce its physical evidence in a theft case as a part of its case in chief. If it does not do so the defense may strike from the record all relative evidence. In *Pulliam v. State*<sup>141</sup> the court overruled *Keiton*, characterizing the decision as an anomaly without support in law. The state need only introduce testimony concerning the object of the theft, and not the object itself.

*d. Evidentiary Harpoon.*—In *Brune v. State*<sup>142</sup> a police witness made three impermissible statements at trial, and a motion for mistrial was denied. The First District Court of Appeals in applying the thirteen considerations for determination of mistrial set out by the Indiana Supreme Court in *White v. State*<sup>143</sup> upheld

<sup>135</sup>*Alexander v. State*, 340 N.E.2d 366 (Ind. Ct. App. 1976); *Miller v. State*, 338 N.E.2d 733 (Ind. Ct. App. 1975); *Fry v. State*, 330 N.E.2d 367 (Ind. Ct. App. 1975).

<sup>136</sup>*Cobbs v. State*, 338 N.E.2d 632 (Ind. 1975); *Smith v. State*, 215 Ind. 629, 21 N.E.2d 709 (1939); *Crickmore v. State*, 213 Ind. 586, 12 N.E.2d 266 (1938).

<sup>137</sup>*Jenkins v. State*, 335 N.E.2d 215 (Ind. 1975); *Franks v. State*, 323 N.E.2d 221 (Ind. 1975); *Fenwick v. State*, 307 N.E.2d 86 (Ind. Ct. App. 1974).

<sup>138</sup>346 N.E.2d 591 (Ind. 1976), also discussed at text accompanying note 199 *infra*.

<sup>139</sup>*Id.* at 597-98. Justice Hunter in his concurring opinion stated that the common scheme or plan exception was not applicable in the case at bar, but that the identity exception was the appropriate rule. The identity exception permits evidence of other crimes to be admitted into evidence if identity is at issue and the other crimes are connected with the present crime in such a way that proof of them naturally tends to identify the defendant as the culprit in the present crime. *Id.* at 601-02 (Hunter, J., concurring).

<sup>140</sup>250 Ind. 294, 235 N.E.2d 695 (1968).

<sup>141</sup>345 N.E.2d 229 (Ind. 1976), also discussed in text accompanying note 68 *supra*.

<sup>142</sup>342 N.E.2d 637 (Ind. Ct. App. 1976).

<sup>143</sup>257 Ind. 64, 272 N.E.2d 312 (1971). In determining whether a mistrial should result because the jury has heard inadmissible evidence, the court reviewed law from other jurisdictions and found thirteen factors to be considered: (1) Constitutional and statutory provisions concerning harmless

the trial court. From *Brune* and other cases it appears the three major considerations are: overwhelming evidence of guilt, statements unintentionally made, and admonitions to disregard given by the court to the jury.

*e. Hearsay.*—In *Nuss v. State*<sup>144</sup> an issue of self-defense was raised and the trial court excluded as hearsay testimony that the victim had made statements to the defendant's wife threatening the defendant with bodily harm. The First District Court of Appeals, citing *Patterson v. State*,<sup>145</sup> held that the testimony was not hearsay and was therefore admissible. To constitute hearsay a statement must be an out-of-court statement offered in court to establish the truth of the matter asserted. In *Nuss*, the evidence was not offered to prove the truth of the statement, but to show that the defendant had a reasonable belief that his life was in danger and thus acted in self-defense.<sup>146</sup>

*f. Intent.*—The sufficiency of evidence to establish an intent to commit a felony in a burglary case has been subject to a high standard of review since the Indiana Supreme Court's 1969 decision in *Easton v. State*.<sup>147</sup> In *Carter v. State*<sup>148</sup> the defendant was found to have broken into a building while in possession of a pistol, but there was no evidence of any missing property or the presence of burglary tools. The Third District Court of Appeals found this insufficient evidence of intent. In *Lisenko v. State*<sup>149</sup> the police, called to a building as a result of an alarm, found that a steel door had been pried open. Inside the building, the officers found burglary tools and the defendants with their hands up, indicating a desire to surrender. The court of appeals found this insufficient evidence to establish the necessary intent to commit

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error; (2) the degree of materiality of the inadmissible testimony; (3) other admissible evidence of guilt; (4) other evidence tending to prove the same fact; (5) other evidence tending to "cure" the inadmissible testimony; (6) waiver by the defendant; (7) whether the inadmissible testimony was the result of a voluntary statement by the witness or was solicited by the prosecutor or (8) by the defense; (9) the penalty; (10) the existence of other errors; (11) whether the question of guilt was "close or compelling"; (12) the status and experience of the person giving the testimony; (13) whether the objectionable testimony was repeated. *Id.* at 69, 272 N.E.2d at 314-15.

<sup>144</sup>328 N.E.2d 747 (Ind. Ct. App. 1975), also discussed in text accompanying notes 177-79, 187-89 *infra*.

<sup>145</sup>324 N.E.2d 482 (Ind. 1975), discussed in Marple, *Evidence*, *infra* at 237.

<sup>146</sup>328 N.E.2d at 753-54.

<sup>147</sup>248 Ind. 338, 228 N.E.2d 6 (1967). In *Easton* the defendant broke into a former girlfriend's house and was found sitting on the couch watching television. The court found proof of these facts insufficient to prove intent to commit a felony.

<sup>148</sup>345 N.E.2d 847 (Ind. Ct. App. 1976).

<sup>149</sup>345 N.E.2d 869 (Ind. Ct. App. 1976).

a felony. Common sense may tell us that the defendants in these cases had no other probable intent than to steal property, but the law continues to dictate otherwise. It would seem that if inferences of intent to kill may be derived from the use of a deadly weapon,<sup>150</sup> or of intent to deprive the owner of the use of property from the exclusive possession of recently stolen goods,<sup>151</sup> it would not be unreasonable to infer intent to commit a felony from unauthorized presence in a building following forced entry.

A conviction for involuntary manslaughter arising from an automobile collision was based upon evidence that the defendant was intoxicated and that he drove across the center line in *Demmond v. State*.<sup>152</sup> The Third District Court of Appeals reversed and, citing the supreme court in *Shorter v. State*<sup>153</sup> and *DeVaney v. State*,<sup>154</sup> held the evidence insufficient to show beyond a reasonable doubt an intent to commit the unlawful act.<sup>155</sup> Although the defendant may have been intoxicated, crossing the center line could have been the result of negligence; thus the State's evidence was insufficient for conviction. However, *DeVaney* and *Shorter* were cases involving reckless homicide<sup>156</sup> and reckless driving<sup>157</sup> rather than involuntary manslaughter. *Demmond* therefore may stand for a new legal principle, requiring proof of intent to drive across the center line, or doing so with a reckless disregard for the consequences, to support a conviction for involuntary manslaughter in motor vehicle cases.<sup>158</sup>

However, the Indiana Supreme Court did find evidence in a murder trial sufficient to sustain proof of transferred intent in the case of *Henderson v. State*.<sup>159</sup> The defendant was convicted of

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<sup>150</sup>*Vaughn v. State*, 259 Ind. 157, 284 N.E.2d 765 (1972); *Liston v. State*, 252 Ind. 502, 250 N.E.2d 739 (1969); *Petillo v. State*, 228 Ind. 97, 89 N.E.2d 623 (1950); *Doby v. State*, 336 N.E.2d 395 (Ind. Ct. App. 1975); *Miller v. State*, 307 N.E.2d 889 (Ind. Ct. App. 1974).

<sup>151</sup>*Tuggle v. State*, 253 Ind. 279, 252 N.E.2d 796 (1969); *Hartwell v. State*, 321 N.E.2d 228 (Ind. Ct. App. 1974).

<sup>152</sup>333 N.E.2d 922 (Ind. Ct. App. 1975).

<sup>153</sup>234 Ind. 1, 122 N.E.2d 847 (1954).

<sup>154</sup>259 Ind. 483, 288 N.E.2d 732 (1972).

<sup>155</sup>A conviction for involuntary manslaughter under IND. CODE § 35-13-4-2 (Burns 1975) (repealed effective July 1, 1977), requires the state to prove intent to commit the unlawful act beyond a reasonable doubt. *Napier v. State*, 255 Ind. 638, 266 N.E.2d 199 (1971); *Minardo v. State*, 204 Ind. 422, 183 N.E. 548 (1932).

<sup>156</sup>IND. CODE § 9-4-1-54 (Burns Supp. 1976).

<sup>157</sup>*Id.* § 9-4-1-54(c).

<sup>158</sup>*Cf. Broderick v. State*, 249 Ind. 476, 231 N.E.2d 526 (1967), sustaining a conviction of involuntary manslaughter arising from a motor vehicle incident on evidence very similar to that in *Demmond*.

<sup>159</sup>343 N.E.2d 776 (Ind. 1976).

first degree murder for shooting with intent to kill one person and actually killing another, unintentionally. The issue was whether the doctrine of transferred intent applies to premeditation. The court held that if the evidence shows a concurrence of the requisite mental states of premeditation and intent with the criminal act, it is sufficient to sustain a first degree murder conviction even when the deceased was not the intended victim.

*g. Impeachment.*—In *Hall v. State*<sup>160</sup> two different types of impeaching questions were asked of two separate witnesses. When the defendant took the witness stand he was questioned by the prosecutor concerning two prior convictions for auto theft which had occurred twenty years previously. The First District Court of Appeals upheld the question, citing *Ashton v. Anderson*,<sup>161</sup> and found that the age of the conviction does not preclude the state from asking an otherwise proper impeaching question. The age of the prior conviction goes to the weight of the evidence and the credibility of the witness, and is therefore a consideration for the jury. However, the court held improper the defense's cross-examination questions to a state witness concerning his homosexuality, finding that homosexuality per se would not affect the credibility of the witness. In a somewhat radical departure from established practice, the Indiana Supreme Court in *Newman v. State*<sup>162</sup> held that the State must reveal to the jury the existence of a plea bargain with a co-defendant which induced his testimony against his accomplice at trial. Characterizing the plea bargain as something in the nature of a "bribe," the court reversed the conviction because the agreement had not been disclosed.

*h. Res Gestae.*—In *Thomas v. State*<sup>163</sup> the defendant was convicted of murdering his former girlfriend's new boyfriend, and the trial court admitted evidence of a subsequent abduction and rape of the former girlfriend by the defendant. The Indiana Supreme Court held the evidence admissible as a part of the *res gestae*. Citing Professor Wigmore,<sup>164</sup> the court found that the murder, the abduction, and the rape were part of a single occurrence. The fact that the subsequent events occur at a different time and place does not impair their admissibility as long as they are part of an entire episode.

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<sup>160</sup>339 N.E.2d 802 (Ind. Ct. App. 1976).

<sup>161</sup>258 Ind. 51, 279 N.E.2d 210 (1972).

<sup>162</sup>334 N.E.2d 684 (Ind. 1975), also discussed in *Kelso, Professional Responsibility, infra*.

<sup>163</sup>328 N.E.2d 212 (Ind. 1975).

<sup>164</sup>*Id.* at 213, quoting from 1 WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 218, at 719 (3d ed. 1940).

### 7. *Motion for Judgment on the Evidence*

In *Kash v. State*<sup>165</sup> the defendant moved for a judgment of acquittal on the evidence at the close of the State's case pursuant to Trial Rule 50.<sup>166</sup> The Third District Court of Appeals held that the motion should be granted only when there is a total absence of evidence of probative value, either from direct evidence or from reasonable inferences, regarding a material element of the offense. Unless this occurs, the case should be submitted to the jury. It should be noted that in a trial to the court, the motion at the close of the state's evidence is for involuntary dismissal under Rule 41(B), and the same standard applies.

### 8. *Defenses*

*a. Entrapment.*—When a defendant invokes the defense of entrapment, the state has the burden of proving that it had probable cause to suspect that the defendant was engaged in illegal conduct before the trap was set.<sup>167</sup> This issue must be determined, as a matter of law, outside the presence of the jury.<sup>168</sup> Once "probable cause to suspect" has been found by the court, the ultimate issue of entrapment is one for the jury.<sup>169</sup> Most cases have dealt with a known suspect allegedly enticed by police tactics to commit an illegal act. However, in *Thomas v. State*<sup>170</sup> the police, with no probable cause to suspect any one individual, sent an informant into various taverns to solicit drug sales. The Indiana Supreme Court rejected the entrapment defense, holding that the informant merely provided an opportunity for the defendant to commit a crime for which he had a natural propensity. The decision seems to eliminate the previously enunciated require-

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<sup>165</sup>337 N.E.2d 573 (Ind. Ct. App. 1975).

<sup>166</sup>IND. R. TR. P. 50(A) provides:

Where all or some of the issues in a case tried before a jury or an advisory jury are not supported by sufficient evidence or a verdict thereon is clearly erroneous as contrary to the evidence because the evidence is insufficient to support it, the court shall withdraw such issues from the jury and enter judgment thereon or shall enter judgment thereon notwithstanding a verdict. A party may move for such judgment on the evidence:

(1) after another party carrying the burden of proof or of going forward with the evidence upon any one or more issues has completed presentation of his evidence thereon . . . .

This rule supersedes the former motion for directed verdict. However, many still refer to the motion as one for a "directed verdict."

<sup>167</sup>*Walker v. State*, 255 Ind. 65, 262 N.E.2d 641 (1970).

<sup>168</sup>*Id.* at 72, 262 N.E.2d at 645.

<sup>169</sup>*Locklayer v. State*, 317 N.E.2d 868 (Ind. Ct. App. 1974).

<sup>170</sup>345 N.E.2d 835 (Ind. 1976).

ment of showing "probable cause to suspect" a known person before the trap may be baited. Now, presumably snaring a guilty person in the trap justifies the trap itself even in the absence of probable cause to suspect that individual. Therefore the entire question of entrapment may now be solely one for the jury, requiring a determination of whether the defendant was an unwary innocent or an unwary criminal.

b. *Insanity*.—Customarily an examination to determine a defendant's sanity at the time of the crime or at trial is precipitated by a written plea of "not guilty by reason of insanity."<sup>171</sup> However, in *Morris v. State*<sup>172</sup> the defendant's attorney filed a "motion" requesting a psychiatric examination, alleging mental problems but neither insanity at the time of the crime nor incompetency to stand trial. Since the defendant failed to comply with the statutory requirements for pleading insanity,<sup>173</sup> the trial court did not order a psychiatric examination. The Indiana Supreme Court held that the motion, notwithstanding defects in form, was nevertheless sufficient to put the court on notice to order an examination.<sup>174</sup> The failure to do so required reversal.<sup>175</sup>

Although the supreme court is sensitive to any possibility that a defendant may be insane and requires an examination upon minimal allegations, once the examination has been conducted the court has somewhat lightened the procedural burdens on the trial court. As early as 1956 in *Brown v. State*<sup>176</sup> the judge received a psychiatric report that the defendant was competent in all respects, and conducted the trial without a competency hearing. The supreme court held that the right to a hearing is not absolute, but is required only when there are reasonable grounds to believe the defendant is incompetent or insane. A psychiatric report may provide or eliminate such reasonable grounds.

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<sup>171</sup>IND. CODE § 35-5-2-1 (Burns 1975).

<sup>172</sup>332 N.E.2d 90 (Ind. 1975), also discussed at text accompanying notes 75-80 *supra*, 198 *infra*.

<sup>173</sup>IND. CODE § 35-5-2-1 (Burns 1975).

<sup>174</sup>*See* IND. CODE § 35-5-3.1-1 (Burns 1975).

<sup>175</sup>This decision appears to be contrary to a 1973 decision by the Third District Court of Appeals in *Hollander v. State*, 296 N.E.2d 449 (Ind. Ct. App. 1973). *Hollander* required a written pleading of insanity as a prerequisite to placing the issue before the trier of fact. The two cases can be distinguished.

*Morris* deals primarily with the defendant's competency to stand trial while *Hollander* dealt with a plea of not guilty by reason of insanity at the time the crime was committed.

<sup>176</sup>235 Ind. 186, 131 N.E.2d 777 (1956).

g. *Self-defense*.—In *Nuss v. State*<sup>177</sup> the First District Court of Appeals restated the elements of self defense as follows: a person who acted without fault in a place where he had a right to be and who was in real or apparent danger of death or great bodily harm may defend against *all* assaults.<sup>178</sup> He may use whatever force he deems necessary even though, by hindsight, it appears that there was no danger at all.<sup>179</sup> The court stressed that this is not merely a permissible defense, but an absolute defense, and any instruction implying that the killing is merely excusable is erroneous. Furthermore, when self-defense is raised, the court should admit all evidence relating the defendant's belief that he was in danger.

In *McDonald v. State*<sup>180</sup> the defendant approached the victim with a knife in hand. The victim threw a bottle at the defendant, striking him but causing no injury. A fight ensued, resulting in the death of the victim. The defendant was convicted of voluntary manslaughter and on appeal alleged that the jury should have been instructed regarding his attempt to withdraw from the fight. The Indiana Supreme Court held that the trial court's refusal of the instruction was proper because there was no evidence to support the alleged attempt to withdraw.

### 9. *Final Arguments*

A New York statute permitted the judge at a non-jury criminal trial to deny the defendant and his attorney an opportunity to make a closing argument. The United States Supreme Court in *Herring v. New York*<sup>181</sup> found that the statute denied the defendant his sixth amendment right to counsel, holding that denial of the right to summation in any criminal trial deprives the defendant of his right to make a defense.

### 10. *Jury Instructions*

In *Abel v. State*<sup>182</sup> the trial court instructed a jury in a prosecution for theft that they could infer guilt from the defendant's unexplained possession of recently stolen goods. The First District Court of Appeals held this instruction to be im-

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<sup>177</sup>328 N.E.2d 747 (Ind. Ct. App. 1975), also discussed in text accompanying notes 144-46 *supra*, 187-89 *infra*.

<sup>178</sup>See *Brown v. State*, 255 Ind. 594, 265 N.E.2d 699 (1971); *King v. State*, 249 Ind. 699, 234 N.E.2d 465 (1968).

<sup>179</sup>*Heglin v. State*, 236 Ind. 350, 140 N.E.2d 98 (1957).

<sup>180</sup>346 N.E.2d 569 (Ind. 1976).

<sup>181</sup>422 U.S. 853 (1975).

<sup>182</sup>333 N.E.2d 848 (Ind. Ct. App. 1975).



proper since it placed an unconstitutional burden on the defendant to prove his innocence.<sup>183</sup> In substance, the decision stands for the proposition that although the jury may draw an inference from such evidence, it is error for the court to say that proof of certain facts or circumstances would, as a matter of law, create a presumption of guilt.<sup>184</sup>

In *Wilson v. State*<sup>185</sup> the jury was instructed that the defendant would receive credit toward his sentence for pre-trial incarceration time. The First District Court of Appeals held this to be reversible error because the penalty for the crime charged was an indeterminate sentence, which is not to be imposed by the jury. Therefore the instruction was not relevant to the sole issue before the jury, guilt or innocence, and, in addition, the instruction may have been prejudicial. The result may have been different, however, if the crime had carried a determinate sentence to be imposed by the jury, since it would then be reasonable to give the jury this information as an aid in determination of the appropriate sentence.

In *Jarrett v. State*<sup>186</sup> the Third District Court of Appeals found erroneous the trial court's refusal to instruct the jury that simple assault was a lesser included offense under a charge of rape. However, the court found the error in this case to be harmless because the defendant was found guilty as charged. The decision does not define the circumstances in which failure to give such an instruction will constitute reversible error.

In a trial for second degree murder, the First District Court of Appeals in *Nuss v. State*<sup>187</sup> held that it is reversible error for the trial court to give an instruction correctly setting out the elements of self-defense, but stating that under such circumstances the killing "may be excusable."<sup>188</sup> The court held that self-defense is always an absolute defense to a homicide; therefore an instruction implying otherwise is erroneous. The instruction should have been that a killing under circumstances of self-defense "is excusable."<sup>189</sup>

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<sup>183</sup>*Id.* at 853-54. See IND. CODE § 35-41-4-1 (Burns Supp. 1976) (effective July 1, 1977).

<sup>184</sup>See *Turner v. United States*, 396 U.S. 398, 425 (1970) (Black, J., dissenting); *Dedrick v. State*, 210 Ind. 259, 2 N.E.2d 409 (1936). *Contra*, *Turner v. United States*, 396 U.S. 398 (1970). See also Note, *The Presumption Arising From the Possession of Stolen Property: The Rule in Indiana*, 6 IND. L. REV. 73 (1972).

<sup>185</sup>346 N.E.2d 279 (Ind. Ct. App. 1976).

<sup>186</sup>333 N.E.2d 794 (Ind. Ct. App. 1975).

<sup>187</sup>328 N.E.2d 747 (Ind. Ct. App. 1975), also discussed in text accompanying notes 144-46, 177-79 *supra*.

<sup>188</sup>*Id.* at 753 (emphasis in the original).

<sup>189</sup>*Id.* at 755.

In *Denson v. State*<sup>190</sup> the defendant tendered the following instruction: "The Constitution of Indiana, Article 1, section 18, provides: 'The penal code shall be founded on the principles of reformation and not of vindictive judstice [*sic*],'"<sup>191</sup> basing his authority for the instruction on Article 1, section 19 of the constitution which provides that the jury has the right to determine the law and the facts. Citing *Beavers v. State*,<sup>192</sup> the Indiana Supreme Court held this to be an improper instruction because it would be misleading to a jury. The court stated that the jury must base its decision on existing law; any inference that it may make its own law is improper. Article 1, section 18 is a constitutional admonition to the legislature to follow a certain policy in formulating a new penal code and is not for a jury to consider.

Finally, in a very significant decision, the Second District Court of Appeals in *Snelling v. State*<sup>193</sup> held that it is not error for the trial court to send written instructions to the jury during its deliberations. This practice is within the sole discretion of the trial court. This decision brings Indiana in line with other states and federal courts, which have permitted this practice for many years.<sup>194</sup>

### 11. Juror Misconduct and Sequestration

In *Gann v. State*<sup>195</sup> the defendant argued that a bailiff's alleged improper conversation with the jurors during trial was ground for reversal. The Indiana Supreme Court rejected this contention, holding that even if such an allegation is true reversal is not required unless the defendant also shows that he has been prejudiced.<sup>196</sup> This decision negates the "presumption of harm" doctrine previously applied in similar circumstances.<sup>197</sup>

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<sup>190</sup>330 N.E.2d 734 (Ind. 1975).

<sup>191</sup>*Id.* at 737.

<sup>192</sup>236 Ind. 549, 141 N.E.2d 118 (1957).

<sup>193</sup>337 N.E.2d 829 (Ind. Ct. App. 1975), also discussed in Marple, *Evidence*, *infra* at 238.

<sup>194</sup>*See, e.g.*, *Smith v. United States*, 349 U.S. 932 (1955); *Manfredonia v. United States*, 347 U.S. 1020 (1954); *Carrado v. United States*, 210 F.2d 712, 722-23 (D.C. Cir. 1953), *cert. denied sub nom. Williams v. United States*, 347 U.S. 1018 (1954); *Rutledge v. State*, 262 S.W.2d 650 (Ark. 1953); *Brown v. State*, 152 Fla. 508, 12 So. 2d 292 (1943); *People v. Monat*, 200 N.Y. 308, 93 N.E. 982 (1911).

<sup>195</sup>330 N.E.2d 88 (Ind. 1975).

<sup>196</sup>*Id.* at 91. Misbehavior on the part of a juror, in order to warrant a new trial, must be gross. Probable injury to the defendant must also be shown. IND. CODE § 35-1-42-3 (Burns 1975). *Oldham v. State*, 249 Ind. 301, 231 N.E.2d 791 (1967); *Hatfield v. State*, 243 Ind. 279, 183 N.E.2d 198 (1962).

<sup>197</sup>*Conrad v. Tomlinson*, 258 Ind. 115, 279 N.E.2d 546 (1972); *Sparks v. State*, 154 Ind. App. 691, 290 N.E.2d 793 (1972); *Laine v. State*, 154 Ind. App. 81, 289 N.E.2d 141 (1972).

In two cases dealing with sequestered juries, the Indiana Supreme Court seems to be moving in the direction of greater flexibility in the application of certain procedural rules. In the first case, *Morris v. State*,<sup>198</sup> the court held that failure to sequester the jury during trial, over the objection of the defendant, is not reversible error unless it results in prejudice to the defendant. In *Critchlow v. State*<sup>199</sup> the court held permissible the practice of sequestering a jury during deliberation, sending them to a motel for the evening, and resuming deliberation the next day without recording the precise time at which deliberation was interrupted and recommenced.

### G. Sentences

Trial courts often complain about a lack of sentencing alternatives for juvenile offenders who are not waivable to a court of criminal jurisdiction. At least two trial courts have made efforts to forge alternatives to commitment to the Indiana Boys' School, and both attempts were defeated by the Indiana Supreme Court. In *State ex rel. Indiana Youth Center v. Howard Juvenile Court*<sup>200</sup> and *State ex rel. Moore v. Superior Court*,<sup>201</sup> juveniles adjudged delinquent were committed to the Indiana Youth Center and the Indiana State Farm, respectively. Although the Indiana Supreme Court sympathized with the frustration of the trial judges dealing with juveniles who commit serious offenses, in each case the court held the commitments invalid under the clear import of the Indiana Code sections prescribing suitable institutions for juveniles<sup>202</sup> and the classes of offenders who are to be sent to the State Farm<sup>203</sup> and the Youth Center.<sup>204</sup> Until the legislature provides otherwise, these commitments are not authorized.

In *Pruett v. State*,<sup>205</sup> following the reversal of his original

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<sup>198</sup>332 N.E.2d 90 (Ind. 1975), also discussed at text accompanying notes 75-80, 171-75 *supra*.

<sup>199</sup>346 N.E.2d 591 (Ind. 1976), also discussed at text accompanying notes 135-39 *supra*.

<sup>200</sup>344 N.E.2d 842 (Ind. 1976).

<sup>201</sup>321 N.E.2d 204 (Ind. 1975).

<sup>202</sup>IND. CODE § 31-5-7-15(2) (Burns Supp. 1976) provides that a juvenile offender sentenced in juvenile court must be committed to a "suitable public institution."

<sup>203</sup>*Id.* §§ 11-2-5-4, 11-3-2-1 (Burns 1973) provide that males between the ages of 7 and 18 may be committed to the Boys' School and mandates commitment of older male juveniles to the State Farm.

<sup>204</sup>The Indiana Youth Center was established as a facility for male offenders over the age of 15 years convicted of a felony. IND. CODE § 11-3-6-1 (Burns 1973).

<sup>205</sup>332 N.E.2d 212 (Ind. 1975).

felony murder conviction, the defendant pleaded guilty at a second trial and was sentenced to life imprisonment. In his petition for post-conviction relief, the defendant sought credit for all jail and prison time served prior to his second conviction. The Indiana Supreme Court, applying principles of equal protection, ordered that he be given full credit for all incarceration on this charge in the same manner as anyone sentenced to prison. Even though a sentence is for life, the credit may be relevant to a grant of executive clemency or to receipt of privileges while in prison.

In *Martin v. State*<sup>206</sup> the statutory authorization for treatment as a drug abuser<sup>207</sup> as an alternative to commitment to the Department of Corrections survived a constitutional attack. Rejecting the contention that the statute constitutes a special or local law forbidden by the Indiana Constitution,<sup>208</sup> the supreme court held that the legislature may provide alternate means of punishment for certain classes of people without offending the constitution. This law applies generally to the needs of a certain class of offenders and therefore is not local or special. The trial court has discretion to order treatment rather than imprisonment.

The Third District Court of Appeals arrived at a similar conclusion with respect to a petition for treatment as a criminal sexual deviant under the Indiana Criminal Sexual Deviancy Act.<sup>209</sup> In *Biggs v. State*,<sup>210</sup> the trial court denied such a petition although the Indiana Department of Mental Health filed a report recommending that the defendant be treated as a criminal sexual deviant. The court of appeals held this denial to be within the discretion of the trial court. In *Pieper v. State*,<sup>211</sup> the defendant, convicted of sodomy and kidnapping, was medically recommended for treatment as a criminal sexual deviant. The trial court found that he was a criminal sexual deviant and committed him to the custody of the Department of Mental Health on the sodomy conviction, but ordered that he serve the life sentence for kidnapping upon his release from treatment. The Indiana Supreme Court held that this procedure was proper under the statute. Even though the law offers a treatment alternative for certain sex crimes, it does not prohibit punishment for other crimes which were incidentally related to the sex crime.

In *Lewis v. State*<sup>212</sup> the court considered the procedure for

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<sup>206</sup>346 N.E.2d 581 (Ind. 1976).

<sup>207</sup>IND. CODE §§ 16-13-7.5-16 to -18 (Burns 1973).

<sup>208</sup>IND. CONST. art. 4, § 22.

<sup>209</sup>IND. CODE § 35-11-3.1-1 to -33 (Burns 1975).

<sup>210</sup>338 N.E.2d 316 (Ind. Ct. App. 1975).

<sup>211</sup>321 N.E.2d 196 (Ind. 1975).

<sup>212</sup>337 N.E.2d 516 (Ind. Ct. App. 1975).

imposing an enhanced penalty authorized for second offenders under the Offenses Against Property Act.<sup>213</sup> The trial court had imposed the increased penalty without holding an evidentiary hearing. The Third District Court of Appeals, citing the Indiana Supreme Court decision in *Lawrence v. State*,<sup>214</sup> held that if factual questions exist concerning the identity of the accused or the validity of prior convictions, due process requires an evidentiary hearing in order to invoke recidivist penalties. If the case in chief was decided by a jury, the penalty should also be tried before a jury in a bifurcated proceeding. The court also held that although the defendant is entitled to notice that an enhanced penalty is being sought, the notice need not be continued in the charging instrument. Recidivist proceedings may be initiated at any time while the trial court has jurisdiction to impose sentence for the substantive offense. Apparently such proceedings may be initiated at the sentencing hearing if the trial has been to the court.

#### H. Probation and Parole

The United States Supreme Court cases of *Morrissey v. Brewer*<sup>215</sup> and *Gagnon v. Scarpelli*<sup>216</sup> established that an accused is entitled to certain standards of procedural due process in both parole and probation revocation proceedings. However, in *Gagnon* the Court failed to differentiate between the types of limited freedom at issue in the two proceedings and applied identical standards to each. Probation is granted by the sentencing judge, who imposes conditions of freedom; revocation is by the same judge, after a hearing to determine whether a violation has occurred. The minimum standards of due process required are generally afforded by normal judicial proceedings. In contrast, parole is traditionally granted by a board and the parolee is placed under the supervision of an officer who has discretion to decide whether the parolee will remain free. *Morrissey* quite properly held that certain minimum standards of procedural due process should be imposed to avoid arbitrary and capricious revocations initiated by the parole officer. Parole violations are dealt with by nonjudicial personnel who may have taken no part in the decision to release the prisoner or in establishing the conditions of his release. Failure to distinguish between the parole revocation proceedings and probation revocation proceedings has caused considerable confusion among trial courts

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<sup>213</sup>IND. CODE § 35-17-5-12(6) (Burns Supp. 1976) (repealed effective July 1, 1977).

<sup>214</sup>259 Ind. 306, 286 N.E.2d 830 (1972).

<sup>215</sup>408 U.S. 471 (1972).

<sup>216</sup>411 U.S. 778 (1973).

with regard to what may be done, what must be done, and what must not be done. Some trial courts have gone to the extreme of requiring that a new conviction be affirmed on appeal before revocation; some require only probable cause that a crime has been committed; most are somewhere between these extremes. The number of required hearings, the admissibility of evidence, and the burden of proof are among the matters dealt with differently by trial courts because of the lack of clarity in higher court opinions.

In 1973, in *Russell v. Douthitt*,<sup>217</sup> the Indiana Supreme Court relied on *Morrissey* and *Brewer* to hold that a defendant in a parole revocation proceeding is entitled to a "full-blown trial." During the same year, the Second District Court of Appeals in *Ewing v. State*,<sup>218</sup> citing *State ex rel. Gash v. Morgan County Superior Court*,<sup>219</sup> held that probation conditioned on not committing another crime may not be revoked absent conviction of a new crime.

During the Survey period, the First District Court of Appeals in *Dulin v. State*<sup>220</sup> clarified one important issue frequently raised in revocation proceedings by holding that the exclusionary rule does not apply at probation revocation hearings. In *Dulin*, a police officer, upon receipt of an anonymous tip, obtained an invalid warrant to search the defendant's car. The search uncovered marijuana, which was admitted into evidence at the hearing. In reaching its conclusion, the court relied on decisions from other jurisdictions holding the exclusionary rule inapplicable under similar circumstances.<sup>221</sup>

Although the revocation based upon illegally seized evidence was upheld in *Dulin*, one condition of probation was held to be too

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<sup>217</sup>304 N.E.2d 793 (Ind. 1973), noted in Kerr, *Criminal Law and Procedure, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 137, 158-59 (1974).

<sup>218</sup>310 N.E.2d 571 (Ind. Ct. App. 1974).

<sup>219</sup>283 N.E.2d 349 (Ind. 1972). *Gash* may be distinguished because the case did not involve probation, but a suspended sentence.

<sup>220</sup>346 N.E.2d 746 (Ind. Ct. App. 1976).

<sup>221</sup>*United States v. Farmer*, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987 (1975); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2d Cir. 1970); *United States v. Rushlow*, 385 F. Supp. 795 (S.D. Cal. 1974); *United States v. Allen*, 349 F. Supp. 749 (N.D. Cal. 1972); *United States ex rel. Lombardino v. Heyd*, 318 F. Supp. 648 (E.D. La. 1970); *People v. Atencio*, 186 Colo. 76, 525 P.2d 461 (1974); *People v. Dowery*, 20 Ill. App. 738, 312 N.E.2d 682 (1974); *State v. Caron*, 334 A.2d 495 (Me. 1975); *State v. Simms*, 10 Wash. App. 75, 516 P.2d 1088 (1973); Cf. *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975).

vague to be enforceable. The condition authorized revocation if "anyone has sufficient grounds to think that he should be arrested or charged."<sup>222</sup> The court held that a condition of probation must be specific in order to justify revocation and that the language in the condition was too vague to be valid. However, another condition of probation, prohibiting use of controlled substances, was sufficiently specific. The court therefore approved revocation for possession of marijuana. It should be noted that although the defendant in *Dulin* had not been convicted of another crime at the time of revocation, he had violated a condition of his probation. *Dulin* thus may be reconciled with *Ewing*.

## IX. Domestic Relations

*Judith S. Proffitt\**

### A. Adoption and Guardianship of Minors

During the survey period, Indiana courts decided two cases<sup>1</sup> concerning the custody of children following the death of a natural or adoptive parent.

In *Bristow v. Konopka*,<sup>2</sup> the First District Court of Appeals was confronted with a unique fact situation requiring construction of the notice provisions of the guardianship statute.<sup>3</sup> A minor child, Misty Dawn Konopka, had been adopted by her

<sup>222</sup>346 N.E.2d at 747-48.

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The author wishes to thank Marian Meyer for her assistance in the preparation of this article.

<sup>1</sup>*In re Adoption of Lockmondy*, 343 N.E.2d 793 (Ind. Ct. App. 1976); *Bristow v. Konopka*, 336 N.E.2d 397 (Ind. Ct. App. 1975).

<sup>2</sup>336 N.E.2d 397 (Ind. Ct. App. 1975).

<sup>3</sup>IND. CODE § 29-1-18-14 (Burns Supp. 1976). The statute reads, in pertinent part:

Notice of hearing on petition for guardianship.—When an application for the appointment of a guardian is filed with the court, notice of the hearing shall be served as follows:

....

(b) When the application is for the appointment of a guardian for a minor, notice shall be served upon the parents or surviving parent of such minor, if the whereabouts of such minor's parents or surviving parent are known, but no other notice shall be necessary unless ordered by the court;

paternal grandmother, Marjorie Konopka. Following the adoption, Misty resided with Marjorie for five months until Marjorie's death on December 13, 1974. Misty was then cared for by members of Marjorie's family, including the appellants in this case. On December 17, 1974, Debra Konopka, Misty's natural mother, petitioned for appointment as Misty's guardian.<sup>4</sup> The trial court granted the petition without notice to appellants and ordered Misty to be released to Debra's custody. Appellant Bristow and her sister then filed separate motions to set aside Debra's guardianship and each requested appointment as Misty's guardian. When both motions were denied, Bristow and a new party, Hall, appealed.<sup>5</sup>

On appeal, the court first considered appellants' contention that the word "parent" in the guardianship notice statute<sup>6</sup> requires notice of proceedings to those who stand *in loco parentis* to minors and that appellants, by caring for Misty after Marjorie's death, had achieved such status. Relying upon the Indiana Supreme Court's 1974 definition of *in loco parentis* as the assumption of the legal obligation for a child without formal adoption,<sup>7</sup> the court of appeals found that the appellants did not stand *in loco parentis* to Misty since they had acted under a moral rather than a legal obligation.<sup>8</sup> The court therefore held that the statute did not require notice of the guardianship proceedings to the appellants.<sup>9</sup>

Because the guardianship notice statute clearly empowers the court "to require notice not specifically mandated by other language"<sup>10</sup> and in view of the "legal parental hiatus"<sup>11</sup> following

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<sup>4</sup>Although Debra was Misty's natural mother, her legal rights as a parent had been relinquished when Misty was adopted by Marjorie, pursuant to IND. CODE § 31-3-1-9 (Burns 1973). In *Bryant v. Kurtz*, 134 Ind. App. 480, 189 N.E.2d 593 (1963), the court stated that a natural parent whose child is adopted by another "has lost the right to ever see said child again or to have any real knowledge of its whereabouts . . . ." *Id.* at 488, 189 N.E.2d at 597.

<sup>5</sup>Hall had not been a party in the initial action. 336 N.E.2d at 398. However, the court of appeals held that Hall had standing to proceed as a party on appeal pursuant to IND. CODE § 29-1-1-22 (Burns 1972) which reads in pertinent part: "Any person considering himself aggrieved by any decision of a court having . . . jurisdiction in proceedings under this . . . Code may prosecute an appeal . . . ." (emphasis added).

<sup>6</sup>See note 3 *supra*.

<sup>7</sup>*Sturup v. Mahan*, 261 Ind. 463, 305 N.E.2d 877 (1974).

<sup>8</sup>336 N.E.2d at 399.

<sup>9</sup>*Id.*

<sup>10</sup>*Id.* "[B]ut no other notice shall be necessary unless ordered by the court." IND. CODE § 29-1-18-14(b) (Burns Supp. 1976) (emphasis added).

<sup>11</sup>336 N.E.2d at 400.



Marjorie's death, the preferable procedure would be to use the court's statutory power to require notice to those directly caring for Misty.<sup>12</sup> Noting that the guardianship statute requires a court appointing a guardian to be satisfied that the person appointed is "the most suitable among the persons available to act as guardian,"<sup>13</sup> the court found that the situation required both a hearing and notice to the appellants, reversed the lower court, and remanded the case.

Judge Lowdermilk, author of the court's opinion, emphasized that concern for the child's welfare is superior to the rights of a child's natural parents in a guardianship proceeding and specifically stated that the court's conclusion was reached because of the unusual facts of the case.<sup>14</sup> However, the clear implication of the decision is that a court appointing a guardian for a minor child should utilize its statutory power to require notice to any individual actually caring for the child at the time of the appointment, regardless of the legal relationship of the individual to the child.<sup>15</sup>

The Third District Court of Appeals, in deciding *In re Adoption of Lockmondy*,<sup>16</sup> was confronted with issues of the admissibility of evidence and the scope of appellate review in adoptions granted without the consent of natural parents. The trial court granted the petition of Dean R. Jester, stepfather of Stephen Lockmondy and surviving spouse of Stephen's natural mother, to adopt Stephen without the consent of Joseph Lockmondy, Stephen's natural father.<sup>17</sup> The court's decision to grant the adoption was based on the statutory grounds that the natural father had failed to support the child for a period of twelve months, although he was legally obligated and financially able to do so.<sup>18</sup>

On appeal, Mr. Lockmondy first contended that the trial court's admission of the opinion testimony of the social worker employed by the county welfare department regarding the best interests of a child was tantamount to allowing into evidence the welfare department report, which is inadmissible in a contested

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<sup>12</sup>*Id.*

<sup>13</sup>IND. CODE § 29-1-18-18 (Burns 1972).

<sup>14</sup>336 N.E.2d at 400.

<sup>15</sup>See also *In re A.B.*, 332 N.E.2d 226 (Ind. Ct. App. 1975), discussed at text accompanying notes 26-37 *infra*.

<sup>16</sup>343 N.E.2d 793 (Ind. Ct. App. 1976).

<sup>17</sup>Jester, married to Stephen Lockmondy's natural mother for nine years, had petitioned for adoption on September 20, 1973, with the consent of his wife. Before the petition could be granted, Stephen's mother died of injuries sustained in an automobile accident. *Id.* at 794.

<sup>18</sup>IND. CODE § 31-3-1-6(g) (1) (Burns Supp. 1976).

adoption proceeding under Indiana law.<sup>19</sup> The court of appeals found, however, that the social worker had been properly qualified as an expert witness and that, since he had testified from memory rather than from his report, the trial court had not abused its discretion in allowing the testimony. The court did, however, provide a caveat: "Not every social worker may qualify as an expert to render an opinion on an adoption."<sup>20</sup> Mere familiarity with a case will not be sufficient to qualify a social worker as an expert; his training and experience must be of paramount importance in determining his qualification as an expert. The court further pointed out that even an expert's opinion may be subject to objection if it is based on hearsay not usually relied on in the expert's profession or not "normally found reliable."<sup>21</sup>

Mr. Lockmondy then challenged the sufficiency of evidence of his failure to support Stephen. The trial court had made special findings of the fact of nonsupport, but had not found the failure to support was willful.<sup>22</sup> The court of appeals, before passing on the sufficiency of the evidence, explained the standard of review in adoption without consent cases. Following the rule developed by the Indiana Supreme Court in *Harlock v. Oglesby*,<sup>23</sup> the court held that in adoption without consent the appellate court will consider "only the evidence most favorable to the appellee together with any reasonable inferences which may be drawn therefrom to determine whether the decision is sustained by sufficient evidence."<sup>24</sup> The court then found that the trial court's finding was supported by "clear and cogent evidence"<sup>25</sup> and affirmed the decree.

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<sup>19</sup>343 N.E.2d at 795, citing *Attkisson v. Usrey*, 224 Ind. 155, 65 N.E.2d 489 (1946); *In re Adoption of Sigman*, 308 N.E.2d 716 (Ind. Ct. App. 1974); *Jeralds v. Matusz*, 152 Ind. App. 538, 284 N.E.2d 99 (1972); *In re Adoption of Chaney*, 128 Ind. App. 603, 150 N.E.2d 754 (1958). Although IND. CODE § 31-3-1-4 (Burns Supp. 1976) mandates welfare agencies to investigate and make recommendations regarding the advisability of adoptions, this provision applies only to ex parte adoption proceedings. *Attkisson v. Usrey*, 224 Ind. 155, 160-61, 65 N.E.2d 489, 491 (1946). The rationale for the rule is that the report may contain not only hearsay and opinions of laymen, but also "gossip, bias, prejudice, trends of hostile neighborhood feelings, and the hopes and fears of social workers." *Id.*, quoting from *People v. Lewis*, 260 N.Y. 171, 172, 183 N.E. 353, 355 (1932).

<sup>20</sup>343 N.E.2d at 796.

<sup>21</sup>*Id.*

<sup>22</sup>*Id.* at 797 n.6.

<sup>23</sup>249 Ind. 251, 231 N.E.2d 810 (1967).

<sup>24</sup>343 N.E.2d at 798, quoting from 249 Ind. at 260, 231 N.E.2d at 815.

<sup>25</sup>343 N.E.2d at 798. "Clear and cogent" is the standard of proof required by Indiana courts in adoption without consent proceedings. *Id.*, citing *In re Adoption of Bryant*, 134 Ind. App. 480, 189 N.E.2d 593 (1963).

### B. Paternity

*In re A.B.*<sup>26</sup> involved the issue of whether the father of an illegitimate child has the right, prior to a judicial determination of paternity, to be heard in a proceeding instituted by the welfare department to determine that a child is dependent and neglected.<sup>27</sup> The child bore the putative<sup>28</sup> father's name and at the age of one week was placed in the care of the father's mother and sister. One week later, the juvenile petition was filed and the welfare department was given temporary custody of the child. At the juvenile hearing, the father sought to enter his appearance but was advised that he had no standing. He then, through counsel, requested a continuance until his paternity could be judicially established. The request was denied and the father appealed.

On appeal, the father relied heavily on *Stanley v. Illinois*,<sup>29</sup> in which the United States Supreme Court held that due process and equal protection require that the parents of illegitimate children have a right to be heard and to have a determination on the merits in dependency proceedings. The Third District Court of Appeals found the Indiana statute adequate to withstand the appellant's constitutional attack. Citing both the purpose of the statute<sup>30</sup> and its provision for liberal construction,<sup>31</sup> the court held that statutory provisions for voluntary appearance<sup>32</sup> and summons to parents<sup>33</sup> as well as the court's power to require the appearance of any other necessary person<sup>34</sup> vested the court with sufficient discretion to admit "additional parties to the proceedings where

<sup>26</sup>332 N.E.2d 226 (Ind. Ct. App. 1975).

<sup>27</sup>IND. CODE § 31-5-7-8 (Burns 1973) allows any county welfare department to petition a court to determine that a child is dependent and neglected and to request that the child be made a ward of the court or of the county welfare department.

<sup>28</sup>There was no dispute regarding the child's paternity, but at the time of the juvenile petition, the father had not yet established his paternity through judicial decree. 332 N.E.2d at 227.

<sup>29</sup>405 U.S. 645 (1972).

<sup>30</sup>IND. CODE § 31-5-7-1 (Burns 1973).

<sup>31</sup>*Id.* § 31-5-7-2.

<sup>32</sup>

[U]nless the parties hereinafter named shall voluntarily appear, the court shall issue a summons . . . requiring the person or persons who have the custody or control of the child to appear personally. . . . If the person so summoned shall be other than the parent or guardian of the child, then the parent or guardian or both shall also be notified . . . by personal service before the hearing . . . .

*Id.* § 31-5-7-9.

<sup>33</sup>*Id.*

<sup>34</sup>"Summons may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary." *Id.*

necessary to secure substantial justice.”<sup>35</sup> The court then found that the trial court’s denial of the appellant’s request to participate in the proceedings was an abuse of discretion, and reversed the decision.<sup>36</sup>

The court did not reach the issue of whether and under what circumstances the natural parent of an illegitimate child is entitled to notice under the statute. In view of the court’s reliance on the due process and equal protection concepts of *Stanley*, and of the First District Court of Appeals decision in *Bristow v. Konopka*,<sup>37</sup> the practitioner should carefully consider notice to all individuals involved in a child’s care in any case which will determine care and custody of a minor.

In *C.L.B. v. S.T.P.*,<sup>38</sup> petitioner, represented by the county prosecuting attorney,<sup>39</sup> filed a paternity suit against the respondent. Later, the petitioner also filed an affidavit alleging an assault and battery by the respondent against the petitioner. The respondent pleaded guilty to the charge of assault and battery, was fined, and received a suspended sentence. After the guilty plea, the deputy prosecuting attorney informed the appellant that he could not continue the paternity suit and suggested she contact another attorney. Eighteen months later, the paternity suit was dismissed without prejudice by the court sua sponte. The petitioner then sought other counsel and filed a second paternity suit, alleging respondent to be the father of her child and requesting support for the child. The respondent defended against the paternity suit on the ground that dismissal of the first action barred the second because of principles of res judicata and alleged that his guilty plea to the assault and battery charge was the result of a bargain in which the petitioner agreed to discontinue the paternity claim. After a hearing on the petitioner’s motion to strike the respondent’s defense, the trial court enforced

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<sup>35</sup>332 N.E.2d at 228.

<sup>36</sup>The court of appeals also rejected the welfare department’s argument that the appellant was not harmed by exclusion from the initial proceedings because he had the right, pursuant to IND. CODE § 31-5-7-17 (Burns 1973), to petition to have the child restored to him. The court pointed out that on a petition for restoration the burden of proof lay upon the petitioning parent, rather than upon the welfare department in the original proceedings; and that the petition for restoration was subject to the broad discretion of the court. 332 N.E.2d at 228. The same argument was rejected in *Stanley v. Illinois*, 405 U.S. 645, 647-48 (1972).

<sup>37</sup>336 N.E.2d 397 (Ind. Ct. App. 1975), discussed at text accompanying notes 2-15 *supra*.

<sup>38</sup>337 N.E.2d 582 (Ind. Ct. App. 1975).

<sup>39</sup>IND. CODE § 31-4-1-29 (Burns 1973) mandates prosecuting attorneys to act as counsel for plaintiffs in paternity suits, free of charge.

the agreement by dismissing the second paternity suit. The court also overruled the petitioner's subsequent motion to correct errors.<sup>40</sup> The First District Court of Appeals reversed, holding that the theory of *res judicata* could not apply to the second paternity action since the first suit was dismissed by the court on its own motion and therefore no judgment had been rendered on the merits in the first paternity suit.<sup>41</sup>

Conflicting testimony regarding the relationship between the parties resulted in the appeal reported as *G.B. v. S.J.H.*<sup>42</sup> The mother of twins born in January 1973 testified that her relationship with the appellant began in April of 1971 and continued through the late summer of 1972, and that the parties had intercourse several times a week beginning with their second or third date. She further testified that she had no relationships with other men during that period of time, and the appellant presented no evidence conflicting with that statement. However, the appellant contended that the relationship did not begin until April 1972 and that he did not have intercourse with the respondent until sometime after the 1972 "Indianapolis 500." He further testified that upon the first occasion of intercourse the respondent had told him that contraceptives were unnecessary because she was already pregnant.<sup>43</sup> In considering this appeal, the Third District Court of Appeals reiterated the standard that the "[a]ppellant may succeed only if he can show that the evidence supporting the decision establishes . . . a result based on mere conjecture, guess, surmise, possibility or speculation; or if he can show that the only evidence . . . could not induce conviction in any reasonable mind."<sup>44</sup> The court found the preponderance of evidence was sufficient to establish that appellant was the father, and affirmed the lower court's decision.

### C. Dissolution of Marriage

#### 1. Service of Summons

In *Chesser v. Chesser*,<sup>45</sup> a husband appealed from a denial of his motion for relief from a default decree dissolving his marriage and awarding all marital property to his spouse. The basis for

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<sup>40</sup>337 N.E.2d at 583.

<sup>41</sup>*Id.* at 585.

<sup>42</sup>338 N.E.2d 315 (Ind. Ct. App. 1975).

<sup>43</sup>Again, the testimony was conflicting. The petitioner testified that she originally used contraceptives supplied by the father, but that when the supply ran out nothing further was used. *Id.* at 316.

<sup>44</sup>*Id.*, citing *Beaman v. Hedrick*, 146 Ind. App. 404, 255 N.E.2d 828 (1970).

<sup>45</sup>343 N.E.2d 810 (Ind. Ct. App. 1976).

the appeal was that since the appellant had never received summons the court had no personal jurisdiction over him and the decree issued was therefore void.

Mr. and Mrs. Chesser had separated on July 8, 1974, when Mr. Chesser had moved from the marital residence in Otisco, Indiana, to Scottsburg. Mrs. Chesser petitioned for dissolution of marriage three days later. Service of summons on Mr. Chesser was attempted at the Otisco residence of Mrs. Chesser. The First District Court of Appeals found that the service was defective since it did not comply with the statutory requirements of leaving a copy of the summons at the appellant's "dwelling house or usual place of abode"<sup>46</sup> and sending a copy by first class mail to the "last known address of the person to be served."<sup>47</sup> The court also followed the doctrine of *Glennar Mercury-Lincoln, Inc. v. Riley*<sup>48</sup> that a party who is not served pursuant to statute, although he may have actual knowledge of a law suit, is not subject to the personal jurisdiction of a court.

*Chesser* dramatically illustrates that the Indiana practitioner must carefully investigate the location of the parties in any case of family disruption and must precisely comply with the statutory requirement for service of process.

## 2. Irretrievable Breakdown

*Flora v. Flora*<sup>49</sup> contains an excellent discussion of the evidentiary basis of "irretrievable breakdown" required by Indiana's Dissolution of Marriage Act.<sup>50</sup> The Act provides that the grounds for the dissolution of marriage in Indiana are:

- (1) Irretrievable breakdown of the marriage.
- (2) The conviction of either parties [*sic*], subsequent to the marriage, of an infamous crime.
- (3) Impotency, existing at the time of marriage.
- (4) Incurable insanity for a period of at least two [2] years.<sup>51</sup>

Before 1973, Indiana's divorce statute contained the more traditional "fault" grounds, including a catch-all ground of "cruel and inhuman treatment."<sup>52</sup> *Flora* is a case of first impression in

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<sup>46</sup>IND. R. TR. P. 4.1(A) (3).

<sup>47</sup>*Id.* 4.1(B).

<sup>48</sup>338 N.E.2d 670 (Ind. Ct. App. 1975), discussed in Harvey, *Civil Procedure*, *supra* at 91.

<sup>49</sup>337 N.E.2d 846 (Ind. Ct. App. 1975).

<sup>50</sup>IND. CODE §§ 31-1-11.5-1 to -24 (Burns Supp. 1976).

<sup>51</sup>*Id.* § 31-1-11.5-3.

<sup>52</sup>Ch. 43, §§ 6-12, 14-24, 1873 Ind. Acts 107 (repealed 1973).

Indiana regarding whether the determination of irretrievable breakdown should be based upon objective evidence of irretrievable breakdown or upon the subjective state of mind of the parties. After the trial court had ordered dissolution of the marriage the wife appealed, contending that the court must require objective evidence of an irretrievable breakdown of the marriage rather than the expression of one party's unilateral desire to end the marriage.<sup>53</sup> The First District Court of Appeals first stated that a court does not perform a mere ministerial duty in approving petitions for dissolution of marriage, but makes a decision based upon the evidence at final hearing.<sup>54</sup> The key issue in arriving at the decision is whether or not a reasonable possibility of reconciliation exists.<sup>55</sup> In determining whether the possibility exists, the marital relationship as a whole must be considered by the court and the court must be satisfied that the parties can no longer live together because of substantial difficulties.<sup>56</sup> The court of appeals found that the trial court properly received and considered both subjective and objective evidence that an irretrievable breakdown of the marriage had occurred, and, after reviewing the evidence in the light most favorable to the appellee, affirmed the decision of the lower court.<sup>57</sup>

### 3. Defenses

The opinion of Judge Robertson on the petition for rehearing in *Flora*<sup>58</sup> disposes once and for all of the defenses which were traditional under the fault concept of divorce. The defenses of condonation, collusion, recrimination, and laches were not repealed by the legislature, although a repealer of the defenses was

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<sup>53</sup>337 N.E.2d at 849.

<sup>54</sup>*Id.* at 850.

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Upon the final hearing: the court shall hear evidence and, if it finds that the material allegations of the petition are true, either enter a dissolution decree . . . or if the court finds there is a reasonable possibility of reconciliation, the court may continue the matter and may order the parties to seek reconciliation through any available counseling.

IND. CODE § 31-1-11.5-8 (Burns Supp. 1976).

<sup>56</sup>337 N.E.2d at 850.

<sup>57</sup>*Id.* at 850-51. Mr. Flora testified that his allegation of irretrievable breakdown was true and that the parties had excessive arguments. Mrs. Flora confirmed her husband's testimony concerning the arguments and further testified that husband's feelings appeared to have cooled toward her. *Id.* at 851.

<sup>58</sup>*Id.* at 852.

included in the original draft of the Dissolution of Marriage Act.<sup>59</sup> In *Flora*, Judge Robertson held that these defenses are no longer applicable since they are based upon a fault concept of divorce and are therefore not compatible with a termination of marriage under the "no fault" concept of the Dissolution of Marriage Act.<sup>60</sup>

#### 4. Child Custody

Most of the cases decided during the survey period are the result of actions tried under old Indiana divorce law, before the effective date of the Dissolution of Marriage Act.<sup>61</sup> However, the present Act codifies much prior case law; results under the new Act should therefore not be significantly different from decisions under prior law. For example, the present statutory criterion for child custody, "the best interests of the child,"<sup>62</sup> was used by the Second District Court of Appeals in affirming the trial court's custody award based on prior law in *Hurst v. Hurst*.<sup>63</sup>

Custody was awarded to the father of the children in *Howland v. Howland*,<sup>64</sup> although the divorce was granted on the mother's cross-complaint. The evidence was undisputed that Mr. Howland had sired an illegitimate child immediately before the commencement of the divorce action. However, the evidence also established that during the eleven-month separation period Mrs. Howland had totally abdicated her responsibilities for the care of the couple's five minor children. Considering the welfare of the children and evidence that Mr. Howland had shown greater concern for that welfare, the trial court granted custody to him. The Second District Court of Appeals found no error in granting divorce to one party and custody to the other. Although decided under prior law, this case recognizes the concept enunciated in

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<sup>59</sup>Ind. H.R. 1179, 97th Gen. Assembly, § 102(b) (2) (1971). The model for the draft was the 1970 version of the Uniform Marriage and Divorce Act. Note, *Alimony in Indiana Under No-Fault Divorce*, 50 IND. L.J. 541, 545-47 (1975).

<sup>60</sup>337 N.E.2d at 852. The defenses were judicial, rather than legislative, in origin. See *Alexander v. Alexander*, 140 Ind. 555, 38 N.E. 855 (1894) (recrimination); *Armstrong v. Armstrong*, 27 Ind. 186 (1886) (condonation); *Everhart v. Puckett*, 73 Ind. 409 (1881) (collusion). Therefore, judicial action was sufficient to "repeal" the defenses. In 1969, the Indiana Supreme Court had substantially lessened the effect of the defenses through a decision that recrimination was no longer an absolute bar to divorce. See *O'Connor v. O'Connor*, 253 Ind. 295, 253 N.E.2d 250 (1969).

<sup>61</sup>September 1973.

<sup>62</sup>IND. CODE § 31-1-11.5-21 (Burns Supp. 1976).

<sup>63</sup>335 N.E.2d 245 (Ind. Ct. App. 1975).

<sup>64</sup>337 N.E.2d 555 (Ind. Ct. App. 1975).



the Dissolution of Marriage Act that "there shall be no presumption favoring either parent" in determining the best interests of the child.<sup>65</sup>

*Patterson v. Patterson*<sup>66</sup> involved a post-divorce petition by the father of minor children for a change of custody. The children were in the custody of their mother, who had remarried; her present husband was ill and had only a part-time job as a bartender. The family of six, in poor financial condition, had lost its home by foreclosure and was living in a two-bedroom trailer. The school age child had changed schools frequently and had done poorly in school. The father was remarried, employed, and lived with his present wife in a large trailer in a park equipped with playground, tennis courts, and a swimming pool.

In denying the father's petition, the trial court stated that a change in custody could be based only on "compelling, urgent and cogent"<sup>67</sup> circumstances. On appeal, the father contended that the trial court's standard was contrary to law. The Second District Court of Appeals agreed that no Indiana cases establish a standard of "compelling, urgent and cogent," and that the criterion set out by case law for modification of a custody order is a change in circumstances rendering the change necessary for the welfare of the child.<sup>68</sup> The decision of the trial court was affirmed, however, because the court on appeal found that the appellant had not met his burden of proving that the trial judge had departed from the established legal standard that the change in circumstances must be substantial and material.<sup>69</sup> The court of appeals specifically disapproved of "urgent" as a standard for custody modification, but felt that the trial court judge's opinion, taken as a whole, did not carry an implication that the "urgent" standard had been applied.<sup>70</sup>

### 5. Temporary Maintenance

A petition for dissolution of marriage may include a petition for temporary maintenance, temporary support, child custody, temporary restraining orders, and possession of property.<sup>71</sup> The opinion of the Second District Court of Appeals in *Castor v.*

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<sup>65</sup>IND. CODE § 31-1-11.5-21 (Burns Supp. 1976).

<sup>66</sup>333 N.E.2d 115 (Ind. Ct. App. 1975).

<sup>67</sup>*Id.* at 117.

<sup>68</sup>*Partridge v. Partridge*, 257 Ind. 81, 272 N.E.2d 448 (1971); *Perdue v. Perdue*, 254 Ind. 77, 257 N.E.2d 827 (1970); *Brickley v. Brickley*, 247 Ind. 201, 210 N.E.2d 850 (1965).

<sup>69</sup>*Wible v. Wible*, 245 Ind. 235, 196 N.E.2d 571 (1964).

<sup>70</sup>333 N.E.2d at 118.

<sup>71</sup>IND. CODE § 31-1-11.5-7 (Burns Supp. 1976).

*Castor*<sup>72</sup> indicates that orders for temporary maintenance and attorney's fees are appealable under the present statute, just as they were under former law.<sup>73</sup> The new statute, like the old, allows orders for the payment of money which are appealable interlocutory orders pursuant to Appellate Rule 4(B)(1). Mrs. Castor appealed the trial court's order that Mr. Castor pay various household bills and the sum of \$75 per week for a period of eight weeks for her support instead of the \$177 per week she had requested.<sup>74</sup> The court also restrained Mrs. Castor from disposing of any of her own assets, valued at \$11,000, before the final dissolution. On appeal, Mrs. Castor contended that the temporary maintenance award was contrary to law because it deprived her of the "necessities of life" guaranteed by statute.<sup>75</sup> The court of appeals correctly found the statutory language concerning temporary maintenance to be permissive<sup>76</sup> and therefore concluded that the trial court has discretion to decide whether temporary maintenance should be awarded to either spouse. Similarly, the decision of whether or not to issue orders restraining the disposition of property during the separation period is discretionary. Reiterating the standard that an exercise of the court's power for the protection of the parties is reviewable only for an abuse of discretion,<sup>77</sup> the court of appeals affirmed the decision of the trial court.

## 6. Financial Awards

*a. Antenuptial agreements.*—In *Flora v. Flora*,<sup>78</sup> the First District Court of Appeals considered the propriety of allowing the terms of an antenuptial agreement to be admitted as relevant

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<sup>72</sup>333 N.E.2d 124 (Ind. Ct. App. 1975).

<sup>73</sup>Ch. 43, § 17, 1873 Ind. Acts 107 (repealed 1973); ch. 160, § 1, 1939 Ind. Acts 738 (repealed 1973).

<sup>74</sup>The court evidently decided upon the lesser sum because facts showed that Mrs. Castor had previously managed to save \$5 weekly on an allowance of \$60 a week. 333 N.E.2d at 130.

<sup>75</sup>IND. CODE § 31-1-11.5-7(b)(1) (Burns Supp. 1976) allows the court to restrain "any person" from disposing of assets "except in the usual course of business or for the necessities of life."

<sup>76</sup>"The court *may* issue an order for temporary maintenance . . . and *may* issue a temporary restraining order . . . to the extent it deems proper." *Id.* § 31-1-11.5-7(d) (emphasis added).

<sup>77</sup>333 N.E.2d at 129, 130, *citing* *Cox v. Cox*, 332 N.E.2d 395 (Ind. Ct. App. 1975); *Terry v. Terry*, 313 N.E.2d 83 (Ind. Ct. App. 1974); *Farley v. Farley*, 300 N.E.2d 375 (Ind. Ct. App. 1973); *Becker v. Becker*, 141 Ind. App. 562, 216 N.E.2d 849 (1966); *Bahre v. Bahre*, 133 Ind. App. 567, 181 N.E.2d 639 (1962).

<sup>78</sup>337 N.E.2d 846 (Ind. Ct. App. 1975).

evidence on the issue of property division in dissolution of marriage proceedings. Prior to their marriage in 1974, Mr. and Mrs. Flora entered into an agreement providing that property held individually by each of them prior to the marriage and property acquired individually during the marriage would not be subject to the claims of the other spouse at the death of either or in the event of dissolution of the marriage. After dissolution was granted, Mrs. Flora contended unsuccessfully on appeal that it was error for the trial court to admit into evidence the antenuptial agreement. Rejecting her position that antenuptial agreements are contrary to public policy, the court of appeals interpreted the Indiana Dissolution of Marriage Act to mean that settlement agreements, both antenuptial and postnuptial, are expressly encouraged by law.<sup>79</sup> Mrs. Flora further contended that her husband had waived the provisions of the agreement by requesting the court, in his Petition for Dissolution of Marriage, to make an order for the disposition of the property of the parties. The court of appeals determined that since the statute<sup>80</sup> gives the court discretion to make provisions for the disposition of property notwithstanding agreements by the parties, the court had power to make such disposition without regard to a request from either party. Consequently, the court held that the request did not constitute a waiver of the agreement.<sup>81</sup> The court also stated that there is a presumption that a settlement agreement is valid, and therefore: "The burden of persuasion as to factors militating against the presumption of validity should be borne by the objecting party."<sup>82</sup> Although the court upheld the agreement in *Flora*, language in this opinion indicates to the practitioner that antenuptial agreements may be of little value in Indiana since the trial court, by statute, has the discretion to

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<sup>79</sup>*Id.* at 851. IND. CODE § 31-1-11.5-10 (Burns Supp. 1976) provides, in pertinent part:

Agreements.—(a) To promote the amicable settlement of disputes that have arisen *or may arise* between the parties to a marriage attendant upon the dissolution of their marriage, the parties may agree in writing to provisions for the maintenance of either of them, the disposition of any property owned by either or both of them . . . .

(b) In an action for dissolution of the marriage the terms of *the agreement* if approved by the court shall be incorporated and merged into the decree and the parties ordered to perform them, or the court may make provisions for disposition of property . . . . (emphasis added). The court's decision is in harmony with the statutory policy favoring post and antenuptial agreements in the probate context. See IND. CODE § 29-1-3-6 (Burns Supp. 1972).

<sup>80</sup>*Id.* § 31-1-11.5-10(b) (Burns Supp. 1976).

<sup>81</sup>337 N.E.2d at 851.

<sup>82</sup>*Id.* at 852.

make provisions regarding the disposition of property, notwithstanding the terms of an agreement by the parties.<sup>83</sup>

*b. Nature of alimony.*—Although the 1973 Dissolution of Marriage Act omitted the term "alimony," the concept remains important to the Indiana practitioner because of the many controversies arising between parties subsequent to decrees entered under prior law.

The nature of an alimony award made under prior law<sup>84</sup> was considered by the First District Court of Appeals in *White v. White*.<sup>85</sup> The Whites were divorced in 1971 and, among other things, the court ordered Mr. White to pay

as alimony in lieu of property settlement the sum of One Hundred Thousand Dollars (\$100,000) as follows: Thirty-Four Thousand Dollars (\$34,000) cash, and the sum of Sixty-Six Thousand Dollars (\$66,000), payable at the rate of Six Thousand Dollars (\$6,000) beginning January 15, 1972 and the sum of Six Thousand Dollars (\$6,000) each January thereafter, to end including January 15, 1982.<sup>86</sup>

Mr. White made the payments as ordered until his death in 1974. Mrs. White then filed a claim against his estate for \$48,000 representing the balance due. The claim was disallowed by the personal representative of the estate. After a judgment for Mrs. White, the administrator appealed, contending that the payments were a series of "periodic" payments and that the trial court at the time of the divorce could not properly make such an award under the statutes then in effect.<sup>87</sup> Before resolving the issue,

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[T]he trial court may exercise its discretion [pursuant to IND. CODE § 31-1-11.5-10(b) (Burns Supp. 1976)] to accept a settlement agreement as valid, valid in part, or reject it as invalid. However, even if a settlement agreement is accepted as valid, the trial court is not required to approve it or use any part of it in the decree.

337 N.E.2d at 852.

<sup>84</sup>Ch. 43, § 20 1873 Ind. Acts 107 (repealed 1973); ch. 120, § 3, 1949 Ind. Acts 310 (repealed 1973).

<sup>85</sup>338 N.E.2d 749 (Ind. Ct. App. 1975). This case is also discussed in Poland, *Trusts and Decedents' Estates*, *infra*.

<sup>86</sup>338 N.E.2d at 751.

<sup>87</sup>*Id.* at 752. The statute in effect at the time of the award was ch. 120, § 3, 1949 Ind. Acts 310, amending ch. 43, § 22, 1873 Ind. Acts 107 [codified at IND. CODE § 31-1-12-17 (Burns 1973)] (repealed 1973), and expressly stated that "the court may require that [alimony] be paid in gross or in periodic payments." The personal representative's contention that the "periodic" payments were illegal under that statute was apparently based upon the following considerations: (1) The 1949 statute had amended a

the court examined treatment of alimony under the statutes prior to the 1973 Dissolution of Marriage Act:

At the root of all of the confusion is judicial indecision as to the reasons for the award of alimony. Cases may be cited in support of at least two major ideas: first, that alimony is a property settlement; and, second, that alimony is an award for the future support of the wife. In *Wellington v. Wellington*, [Ind. App., 304 N.E.2d 347], the court eventually concluded “. . . in the final analysis that alimony serves a dual purpose—a method to aid in the equitable distribution of property and a method to provide continued maintenance or support if deemed appropriate. It is not necessary as many Indiana cases have done, to theorize the concept into an either/or situation. The concepts are not mutually exclusive.”<sup>88</sup>

The court determined that what the *White* court had incorrectly characterized as “alimony” was “in essence a cash distribution in lieu of a disposition of property.”<sup>89</sup> The court found that the 1949 Act did not remove the trial court’s option of requiring payment of a sum certain in installments and that payment in installments did not diminish the amount ultimately due Mrs. White. Accordingly, the judgment of the trial court was affirmed.

The court of appeals also held that alimony is a property settlement in *Eppley v. Eppley*.<sup>90</sup> On appeal, Mrs. Eppley contended that the trial court had abused its discretion in awarding her alimony in the “meager” sum of \$30,000. The record indicated that the couple’s assets on the date of separation amounted to \$84,172, and that Mr. Eppley earned approximately \$90,000 in 1973. Holding that under Indiana law alimony is a property settlement<sup>91</sup> rather than future support for a spouse or compensation for injured sensitivities,<sup>92</sup> the court of appeals found the

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prior statute which allowed for alimony awards to be made only in gross, although payment could be made in installments, 338 N.E.2d at 754; (2) the 1949 act’s provision for “periodic payments” was actually a rephrasing of the previous statute’s provision for installment payments; and (3) the award of alimony to Bette was not the award of a gross amount to be paid in installments, legal under the statute, but was an award of an indefinite sum to be paid periodically, illegal under the statute. See *id.* at 754-55.

<sup>88</sup>338 N.E.2d at 753.

<sup>89</sup>*Id.* at 754.

<sup>90</sup>341 N.E.2d 212 (Ind. Ct. App. 1976).

<sup>91</sup>*Doner v. Doner*, 302 N.E.2d 511 (Ind. Ct. App. 1973).

<sup>92</sup>*Shula v. Shula*, 148 Ind. App. 496, 267 N.E.2d 555 (1971).

trial court's judgment within the bounds of discretion and affirmed.

Mrs. Eppley also alleged error in that in evaluating assets for the property division, which included \$16,172 in tangible assets as well as the \$30,000 alimony award, the trial court used property appraisals at the time of the separation rather than at the time of the final hearing. The court of appeals acknowledged that the time of valuation could materially affect the court's determination of a property settlement; but it held that the determination to use valuations of one date or another should be left to the trial court's discretion, since an inflexible rule could encourage conduct seeking to distort the true value of marital property.<sup>93</sup>

*c. Maintenance.*—The case of *Liszkai v. Liszkai*<sup>94</sup> is particularly important for the Indiana practitioner as a judicial interpretation of the maintenance provision of the Dissolution of Marriage Act.<sup>95</sup> Mrs. Liszkai was granted a property settlement<sup>96</sup> of \$5,000 to be paid over a period of twenty months, considerably more than one-half of the parties' net worth of approximately \$7,900. She appealed, contending that her poor education and lack of marketable skills "incapacitated" her to such an extent that she was entitled to maintenance<sup>97</sup> in addition to the property settlement.<sup>98</sup> The Second District Court of Appeals

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<sup>93</sup>341 N.E.2d at 218.

<sup>94</sup>343 N.E.2d 799 (Ind. Ct. App. 1976).

<sup>95</sup>IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976).

<sup>96</sup>The trial court had incorrectly denominated the award "alimony," a term eliminated in the Dissolution of Marriage Act. 343 N.E.2d at 804. The proper term for an award of property pursuant to the statutory provision is "property settlement" or "property disposition." Fox, *Domestic Relations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 197, 205 (1975) [hereinafter cited as Fox].

<sup>97</sup>

The court may make no provision for maintenance except that when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected, the court may make provision for the maintenance of said spouse during such incapacity, subject to further order of the court.

IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976).

<sup>98</sup>Mrs. Liszkai also contended on appeal that the trial court had abused its discretion in the property settlement by failing to consider the parties' earning abilities as mandated by *id.* § 31-1-11.5-11(e). The court of appeals found no abuse of discretion, since the trial court had considered the other guidelines statutorily required for a "just and reasonable" division of property and there was ample evidence that Mr. Liszkai's earnings would be consumed by his responsibilities for the homes and the children in his custody. 343 N.E.2d at 804.

correctly stated that the General Assembly adopted "a concept of property division separate from the concept of maintenance by enacting" two separate provisions for property division and maintenance, and that the guidelines for each provision are different.<sup>99</sup> Maintenance may only be granted when the court finds a spouse to be physically or mentally incapacitated to the extent that the ability of the spouse to support himself or herself is materially affected.<sup>100</sup> Evidence revealed that Mrs. Liszkai had been employed intermittently outside the home during the marriage although she was primarily a homemaker, and there was no evidence that she was in poor health. The court of appeals therefore found that the trial court did not abuse its discretion in finding Mrs. Liszkai was not incapacitated within the meaning of the statute.

The court acknowledged that the phrase "unable to support" could be construed to include unemployable spouses,<sup>101</sup> but found that the legislature did not intend to give such an effect to the statute. Judge Buchanan, writing for the majority, first noted that the original draft of the Act would have allowed a court to order maintenance for a spouse "*unable to support himself through employment.*"<sup>102</sup> He then pointed out that the General Assembly had rejected this more liberal provision for maintenance in favor of maintenance only for a spouse physically or mentally incapacitated. From these facts the court inferred that "to construe section 9(c) as including general unemployability due to the lack of many marketable skills [would be] ravishing section 9(c)."<sup>103</sup>

*Liszkai* and the Second District Court of Appeals decision in

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<sup>99</sup>*Id.* at 804-05.

<sup>100</sup>IND. CODE § 31-1-11.5-9(c) (Burns Supp. 1976).

<sup>101</sup>Judge Sullivan argued that unemployable individuals may be "incapacitated" within the meaning of the statute, but concurred in the result in the case. 343 N.E.2d at 806 (Sullivan, J., concurring).

Support for Judge Sullivan's position may be found in Senator Merton Stanley's version of the legislative history of the Dissolution of Marriage Act. See Note, *Alimony in Indiana Under No-Fault Divorce*, 50 IND. L.J. 541, 549-50. The second version of the bill, introduced in the 1972 General Assembly, provided for maintenance only for a spouse who was "physically or mentally incapacitated." Ind. H.R. 1021, 97th Gen. Assembly, 2d Sess. § 10(b) (1972). In 1973, the House Judiciary Committee added the phrase "to the extent that the ability of such incapacitated spouse to support himself or herself is materially affected." 1973 IND. H.R. JOUR. 790. Senator Stanley indicated that the legislative purpose of the change was to broaden the concept of incapacity to include unemployable spouses. Note, *Alimony in Indiana Under No-Fault Divorce*, *supra* at 550.

<sup>102</sup>343 N.E.2d at 805, quoting from Ind. H.R. 1179, 97th Gen. Assembly, § 210 (1971) (emphasis by the court).

<sup>103</sup>343 N.E.2d at 806.

*Temple v. Temple*<sup>104</sup> clearly illustrate a trend to construe the maintenance provision of the statute narrowly and to award maintenance only when a spouse's incapacity results from a physical or mental disease and the disease is serious enough to render the spouse incapable of gainful employment.

*d. Property division.*—In *Hurst v. Hurst*,<sup>105</sup> Mr. Hurst not only received custody of the couple's minor child,<sup>106</sup> but was also granted the family residence, valued at \$35,000, subject to a mortgage of approximately \$7,500, some furniture, and farm equipment and tools. Mrs. Hurst was granted household furniture and furniture she had inherited from her family and the sum of \$13,750. On appeal Mrs. Hurst claimed that the family residence was "ancestral property" to which she had an emotional attachment which should have been considered in the property division. The record indicated, however, that Mrs. Hurst had lived on the property for only seven years during her childhood and that the Hursts had purchased the property from Mrs. Hurst's mother in 1954. The trial court had also considered the fact that Mrs. Hurst had taken unusually poor care of the premises during her ownership. In awarding the family residence to the parent with custody of the child in an action brought under the old divorce statute, the trial court reached the result suggested by the present Dissolution of Marriage Act.<sup>107</sup>

The property settlement in *Howland v. Howland*<sup>108</sup> was reversed and remanded for new trial because there was no evidence in the record of the market value of the assets used in the husband's sole proprietorship or business income, and thus no information on which the court could make a reasonable evaluation of the property of the marriage. In reversing as to the property division, the court stated that there is an abuse of discretion if the trial court distributes property without knowing the value of the

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<sup>104</sup>328 N.E.2d 227 (Ind. Ct. App. 1975) discussed in Fox, *supra* note 96, at 207-09. In *Temple*, a wife suffering from grand mal epilepsy, controlled by maximum doses of medication, was held not to be entitled to maintenance.

<sup>105</sup>335 N.E.2d 245 (Ind. Ct. App. 1975).

<sup>106</sup>See text accompanying notes 62-63 *supra*.

<sup>107</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1976) provides, in pertinent part:

Disposition of property.—. . . .

In determining what is just and reasonable the court shall consider the following factors:

(c) . . . the desirability of awarding the family residence or the right to dwell therein . . . to the spouse having custody of any children . . . .

<sup>108</sup>337 N.E.2d 555 (Ind. Ct. App. 1975).



property distributed.<sup>109</sup> This rule should not change in cases arising under present law, since the Dissolution of Marriage Act mandates the court to arrive at a property settlement by division of "the property of the parties, whether owned by either spouse prior to the marriage, acquired by either spouse in his or her own right after the marriage . . . or acquired by their joint efforts."<sup>110</sup>

*Reed v. Reed*<sup>111</sup> also concerned the division of property incident to a divorce action under prior law. Mrs. Reed was awarded approximately half the property owned jointly by the parties and retained all of her individual property, composed of certain farm land inherited from her mother. The Second District Court of Appeals found that the property settlement created no "semblance of abuse of discretion" and that the appeal deserved "only minimal consideration."<sup>112</sup> The court found that the trial court followed the standards of *Bahre v. Bahre*<sup>113</sup> by considering as factors in determining the property division the existing property rights of the parties, and whether or not the wife's efforts had contributed to the accumulation of the family property.<sup>114</sup> The question of the disposition of inheritances in a dissolution of marriage is now met by statutory guidelines: "In determining what is just and reasonable the court shall consider the following factors: . . . (b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift . . . ."<sup>115</sup>

A problem often arising in property division was considered in *Wireman v. Wireman*.<sup>116</sup> Lewis Wireman transferred assets to an irrevocable trust for the benefit of their children just before his wife, Dianne, filed for divorce. On appeal, Dianne alleged that the trial court's exclusion of transferred assets resulted in an incorrect valuation of marital property and therefore an error in the alimony award. In Indiana, property transferred by one spouse to defeat the other spouse's claim to alimony or the collection of alimony may be set aside as a fraudulent transfer.<sup>117</sup> Following the rule that an equitable property settlement cannot be made

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<sup>109</sup>337 N.E.2d at 559, citing *Hardiman v. Hardiman*, 152 Ind. App. 675, 284 N.E.2d 820 (1972); *Snyder v. Snyder*, 137 Ind. App. 72, 198 N.E.2d 8 (1964).

<sup>110</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1976).

<sup>111</sup>338 N.E.2d 728 (Ind. Ct. App. 1975).

<sup>112</sup>*Id.* at 732.

<sup>113</sup>133 Ind. App. 567, 181 N.E.2d 639 (1962).

<sup>114</sup>338 N.E.2d at 733.

<sup>115</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1976).

<sup>116</sup>343 N.E.2d 292 (Ind. Ct. App. 1976).

<sup>117</sup>*State ex rel. American Fletcher Nat'l Bank v. Spencer Circuit Court*, 242 Ind. 74, 175 N.E.2d 23 (1961); *Kuhn v. Kuhn*, 125 Ind. App. 337, 123 N.E.2d 916 (1955); *Schmeling v. Esch*, 84 Ind. App. 247, 147 N.E. 734 (1925).

unless all of the property held by the spouses is considered by the court,<sup>118</sup> the Second District Court of Appeals remanded the case to determine whether the transfer was fraudulent and, if so, whether an adjustment should be made in the property settlement.

A division of property under the 1973 Dissolution of Marriage Act was reviewed by the Third District Court of Appeals in *Johnson v. Johnson*.<sup>119</sup> The statute provides that property be divided in a "just and reasonable manner" and mandates the consideration of specific factors in determining the division.<sup>120</sup> At the time of the dissolution, the wife was fifty years old and was earning \$3,120 per year, while the husband was age fifty-six, earned \$20,000 per year and would be eligible for railroad retirement benefits in nine years. The marital assets consisted of a 1973 Plymouth, household furniture worth approximately \$700, and the family residence valued at \$28,500 and subject to a mortgage of \$12,700. The trial court awarded virtually all of the assets to Mrs. Johnson. The court of appeals affirmed the award, stating, "In the case at bar, considering the age and economic circumstances of the parties and their respective earnings and earning abilities, we cannot say, in view of the limited nature of the assets, that the court's decision was clearly against the logic and effect of the evidence."<sup>121</sup>

*e. Child support.*—In reviewing child support, property division, and alimony, the First District Court of Appeals in *Eppley v.*

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<sup>118</sup>*Hardiman v. Hardiman*, 152 Ind. App. 675, 284 N.E.2d 820 (1972).

<sup>119</sup>344 N.E.2d 875 (Ind. Ct. App. 1976).

<sup>120</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1976). The factors to be considered by the court in making the decision are:

(a) the contribution of each spouse to the acquisition of the property, including the contribution of a spouse as homemaker;

(b) the extent to which the property was acquired by each spouse prior to the marriage or through inheritance or gift;

(c) the economic circumstances of the spouse at the time the disposition of the property is to become effective, including the desirability of awarding the family residence or the right to dwell therein for such periods as the court may deem just to the spouse having custody of any children;

(d) the conduct of the parties during the marriage as related to the disposition or dissipation of their property;

(e) the earnings or earning ability of the parties as related to a final division of property and final determination of the property rights of the parties.

<sup>121</sup>344 N.E.2d at 877. The court of appeals also indicated the lower court's property division could have appropriately granted the husband an interest in the equity in the family residence, but that failure to do so was not an abuse of discretion. *Id.*

*Eppley*<sup>122</sup> reiterated that the trial court's decision in such matters will be reviewed only for an abuse of discretion. Mr. Eppley had been ordered to pay \$150 per month for support of his nine-year-old daughter. Mrs. Eppley had testified that the necessary monthly living expenses of the child totalled \$839.70,<sup>123</sup> and on appeal she contended that the support award was an abuse of discretion. Pointing out that support awards are for the support of the child and not for the custodial parent, and that the custodial parent may reasonably be expected to contribute to the child's support, the court of appeals affirmed the support award. The court's decision was in conformity with the present statutory provision that "the court may order either parent or both parents to pay any reasonable amount for support of a child."<sup>124</sup>

During the recent period of inflation and economic recession, petitions to modify existing child support orders have been filed with increasing frequency. The statutory criterion for modification of support orders is "a showing of changed circumstances so substantial and continuing as to make the terms unreasonable."<sup>125</sup> Prior case law had established that the determination of a "substantial change in circumstances" necessary for a modification is within the sound discretion of the trial court and is reviewable only upon an abuse of such discretion.<sup>126</sup>

*Carlile v. Carlile*<sup>127</sup> concerned a petition by Mr. Carlile to have child support payments for three children reduced from the \$50 per week ordered in the decree of divorce fourteen months earlier. In addition, he asked to be relieved of the obligation to pay a second mortgage on residence real estate awarded to his wife at the time of the divorce. Evidence at the hearing on Mr. Carlile's petition revealed that at the time of the divorce he had been earning between \$680 and \$702 per month and that at the time of the modification hearing his monthly net had decreased to approximately \$672. Obligations for debts and support under the divorce decree totalled \$560.60, leaving him \$111.40 each month for living expenses. Both parties had remarried and both Mrs. Carlile (Hayes) and her present husband were employed. The record did not reveal whether Mr. Carlile's present wife was employed. The trial court reduced Mr. Carlile's child support obli-

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<sup>122</sup>341 N.E.2d 212 (Ind. Ct. App. 1976).

<sup>123</sup>*Id.* at 215. The figure included sums for auto expenses, newspapers and hairdressers, all of which the court of appeals deemed "beyond the realm of necessity for a nine year old girl." *Id.*

<sup>124</sup>IND. CODE § 31-1-11.5-12 (Burns Supp. 1976).

<sup>125</sup>*Id.* § 31-1-11.5-17.

<sup>126</sup>*See, e.g.,* Dragoo v. Dragoo, 133 Ind. App. 394, 182 N.E.2d 434 (1962).

<sup>127</sup>330 N.E.2d 349 (Ind. Ct. App. 1975).

gation to \$30 weekly during the time he was paying the second mortgage. On review, the trial court's decision was found not to be an abuse of discretion and was affirmed.

In *Vance v. Hampton*,<sup>128</sup> the First District Court of Appeals reiterated its statement in *Carlile* that support orders must be "based upon reasonable and proper grounds" and will be modified only for "substantial reasons," and that denial of a request for modification is reviewable only for abuse of discretion.<sup>129</sup> At the time of the divorce, the court had ordered Mr. Hampton to pay \$100 for child support every two weeks until his former wife's remarriage, and \$25 per week thereafter. Mrs. Hampton remarried two days after the divorce, but subsequently her marriage to Mr. Vance was dissolved. She then petitioned to modify the support decree to increase the support obligation of Mr. Hampton to \$100 every two weeks. The evidence revealed that Mrs. Vance's financial situation was better than Mr. Hampton's, since she was employed and received child support from both former husbands. The court of appeals therefore held that the trial court's denial of modification was not an abuse of discretion and affirmed the decision.

Modification and enforcement of decrees were considered in *Linton v. Linton*.<sup>130</sup> The Lintons were divorced in August 1970. In the decree, Mr. Linton was ordered to pay alimony of \$2,400 at the rate of \$100 per month, child support of \$70 per week, hospitalization insurance, and medical expenses of the couple's children. He paid only one \$70 support payment and in September 1971, the parties entered into a modification agreement approved by the court. The agreement provided for certain stock transfers to be made to Mrs. Linton to discharge support and alimony arrearages, reduced child support payments, and provided that alimony payments were not to be made for one year following the modification. The agreement also provided:

8. It is further agreed by the parties and ordered by the Court that this Agreed Modification of Divorce Decree shall be contingent upon Defendant's performance of the agreed obligation herein and compliance with the Court's orders herein for a period of 12 months from the date of this order; in the event Defendant shall breach the agreement between the parties herein and shall be adjudged in contempt of Court thereon, then this Agreed

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<sup>128</sup>337 N.E.2d 154 (Ind. Ct. App. 1975).

<sup>129</sup>*Id.* at 157, quoting from *Carlile v. Carlile*, 330 N.E.2d 349 (Ind. Ct. App. 1975).

<sup>130</sup>336 N.E.2d 687 (Ind. Ct. App. 1975).

Modification of Decree of Divorce shall be null and void, and the amounts so paid shall be applied against the amount due under the Decree of Divorce dated the 12th day of August, 1970.<sup>131</sup>

When Mr. Linton again failed to pay alimony, his former wife filed a petition for contempt, asking that he be found in contempt under both the modification agreement and the original decree, and that the modification be declared void. The court found that he had breached the modification agreement, that the agreement was therefore void, and that he was in contempt of court. Mr. Linton's motions to strike the petition for contempt, for change of venue, and for summary judgment were all overruled and were the basis of his appeal.

The Second District Court of Appeals found no error in the trial court's denial of Mr. Linton's motion for change of venue. Trial Rule 76, under which he claimed to be entitled to the change, applies only to civil actions. The rule does not apply to a contempt of court action, which "is neither civil, criminal nor equitable for the reason that the right to exercise this power is inherent in all our courts."<sup>132</sup>

However, the trial court's contempt judgment against Mr. Linton was reversed as contrary to law, since enforcement of alimony decrees payable in money through contempt would violate article 1, section 22 of the Indiana Constitution in that it would amount to imprisonment for debt.<sup>133</sup>

The ambiguity of paragraph 8 of the modification agreement was discussed to determine whether the parties intended that a one-year test period be established during which the original decree was temporarily suspended or whether the intent was to substitute the modification agreement, thus superseding the decree. The latter interpretation was deemed correct by the trial court and affirmed on appeal.<sup>134</sup>

*f. Attorney's fees.*—In *Castor v. Castor*,<sup>135</sup> Mrs. Castor contended on appeal that the trial court had erred in awarding her attorney \$250 as preliminary attorney's fees. The trial court had

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<sup>131</sup>*Id.* at 691.

<sup>132</sup>*Id.* at 692, quoting from *State ex rel. Grile v. Allen Circuit Court*, 249 Ind. 173, 176, 231 N.E.2d 138, 139-40 (1967).

<sup>133</sup>*Marsh v. Marsh*, 162 Ind. 210, 70 N.E. 154 (1904). However, if alimony consists of other types of payments, the order may be enforced by contempt. See *State ex rel. Schutz v. Marion Superior Court*, 307 N.E.2d 53 (Ind. 1974); *Wellington v. Wellington*, 304 N.E.2d 347 (Ind. Ct. App. 1973) discussed in *Fox, supra* note 96, at 210-11.

<sup>134</sup>336 N.E.2d at 694.

<sup>135</sup>333 N.E.2d 124 (Ind. Ct. App. 1975).

excluded Mrs. Castor's attorney's testimony concerning time spent prior to filing the original petition for dissolution. The language of the statutory provision for attorney's fees in dissolution cases is permissive,<sup>136</sup> and awards of such fees are reviewable only upon an abuse of discretion.<sup>137</sup> The *Castor* opinion recognizes that it is not uncommon for a trial court to award preliminary partial attorney's fees which may or may not accurately represent the hours rendered by counsel. The use of such standardized fees does not deny the attorney compensation for those services, but merely excludes evidence of such services at the preliminary hearing stage.<sup>138</sup> One should note that the permissive statutory language does not impose an absolute duty upon the husband to pay his wife's legal fees nor does it obligate him to pay the full cost of services of the wife's attorney.<sup>139</sup>

In *Johnson v. Johnson*,<sup>140</sup> Mr. Johnson claimed as error the award to Mrs. Johnson of attorney's fees incurred in defending the motion to correct errors and the appeal.<sup>141</sup> However, the statute provides for a discretionary award of attorney's fees, including fees for appeal.<sup>142</sup> The court of appeals, affirming, found that the fees were reasonable and that Mr. Johnson's income was sufficient to allow him to pay the award.<sup>143</sup>

In *Linton v. Linton*,<sup>144</sup> Mr. Linton contended on appeal that the trial court's award of attorney's fees to his former wife was improper. He argued that the trial court was without jurisdiction

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<sup>136</sup>IND. CODE § 31-1-11.5-16 (Burns Supp. 1976) provides: "The court from time to time *may* order a party to pay a reasonable amount for the cost to the other party . . . for attorney's fees . . ." (emphasis added).

<sup>137</sup>333 N.E.2d at 127, 128-29, citing *Cox v. Cox*, 322 N.E.2d 395 (Ind. Ct. App. 1975) (fee award of \$2,000 was not an abuse of discretion even though there was no evidence regarding fees on the record); *DeLong v. DeLong*, 315 N.E.2d 415 (Ind. Ct. App. 1974) (award of \$100 attorney fee for modification of a decree was not an abuse of discretion); *Farley v. Farley*, 300 N.E.2d 375 (Ind. Ct. App. 1973) (award of \$6,500 "suit money" was not an abuse of discretion, even though the party had received a property settlement of \$87,500). *Northup v. Northup*, 154 Ind. App. 469, 290 N.E.2d 501 (1972) (award of \$500 attorney's fees was not an abuse of discretion even though there was no evidence in the record to support the award, since the trial court may take judicial notice of attorney's services); *McDaniel v. McDaniel*, 245 Ind. 551, 201 N.E.2d 215 (1964) (award of attorney's fees in an amount less than that requested and supported by evidence was not an abuse of discretion).

<sup>138</sup>333 N.E.2d at 127.

<sup>139</sup>*Id.* at 128.

<sup>140</sup>344 N.E.2d 875 (Ind. Ct. App. 1976).

<sup>141</sup>See text accompanying notes 119-21 *supra*.

<sup>142</sup>IND. CODE § 31-1-11.5-16 (Burns Supp. 1976).

<sup>143</sup>344 N.E.2d at 877.

<sup>144</sup>336 N.E.2d 687 (Ind. Ct. App. 1975).

to grant her petition for fees because it was filed after the appeal was perfected and the trial court was, therefore, without jurisdiction. The general rule is that perfection of an appeal results in removal of jurisdiction to the appellate court and a concomitant loss of jurisdiction of the trial court.<sup>145</sup> However, the rule is inapplicable in divorce proceedings because the trial court is deemed to have continuing jurisdiction of matters before the higher court.<sup>146</sup> The court of appeals therefore affirmed the trial court's decision.

## X. Evidence

*William Marple\**

### A. Impeachment

A defendant's post-arrest silence may not be used even to impeach his trial testimony. The Indiana Court of Appeals in *Lukas v. State*<sup>1</sup> held that a charge or accusation made while the accused is in police custody does not call for a reply and failure to deny or explain the accusation does not constitute an admission. This is an exception to the general rule that when one is accused of or charged with an offense and fails to contradict or explain the charge, both the accusation and failure to respond may be admitted into evidence as a tacit or adoptive admission.<sup>2</sup>

*Lukas* is incorrect in its reliance on earlier cases of silence while in police custody.<sup>3</sup> In *Lukas*, the charge or accusation was made by the defendant's stepson at a time when he and the

<sup>145</sup>*Lake County Dep't of Public Welfare v. Roth*, 241 Ind. 603, 174 N.E.2d 335 (1961).

<sup>146</sup>*Inkoff v. Inkoff*, 306 N.E.2d 132, 135 (Ind. Ct. App. 1974), *relying on State ex rel. Reger v. Superior Court*, 242 Ind. 241, 177 N.E.2d 908 (1961).

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<sup>1</sup>330 N.E.2d 767 (Ind. Ct. App. 1975).

<sup>2</sup>*Jethroe v. State*, 319 N.E.2d 133 (Ind. 1974), *noted in Marple, Evidence, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 239, 242 (1975) [hereinafter cited as *1975 Survey of Indiana Law*]; *Robinson v. State*, 309 N.E.2d 833 (Ind. Ct. App. 1974), *aff'd*, 317 N.E.2d 850 (Ind. 1974), *noted in Marple, Evidence—Criminal, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 186, 208 (1974) [hereinafter cited as *1974 Survey of Indiana Law*].

<sup>3</sup>The court cited *Garrison v. State*, 249 Ind. 206, 231 N.E.2d 243 (1967), as its most recent application of the rule. The seminal case is *Diblee v. State*, 202 Ind. 571, 177 N.E. 261 (1931), which relied on *Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235, 46 Am. Dec. 672 (1847), and other authorities.



defendant were alone in the jail. Therefore, the policy excluding the charge and accompanying silence because the failure to respond is either an assertion of the fifth amendment right to remain silent or a result of the belief that "he had no right to say anything until regularly called upon to answer"<sup>4</sup> could not possibly apply.<sup>5</sup> Since Indiana courts have been blindly following the *Lukas* rule for years, it is unlikely that it will be modified to distinguish police accusations and admit equivocal response or silence when the charge is made by someone other than a police officer.

The Supreme Court of the United States stated a narrower, but constitutionally-grounded, rule in *Doyle v. Ohio*.<sup>6</sup> The Court held that use for impeachment purposes of a defendant's silence in the face of a police accusation at the time of arrest and after receiving the *Miranda* warnings violates the due process clause of the fourteenth amendment. This decision was fully expected in light of the Court's earlier decision in *United States v. Hale*.<sup>7</sup> In *Doyle*, as in *Hale*, the Court found it fundamentally unfair to advise a defendant that he has a right to remain silent and then use his subsequent silence against him. Additionally, both decisions viewed such silence after *Miranda* warnings have been given as insolubly ambiguous, since the arrestee may be relying on his fifth amendment right to remain silent.<sup>8</sup>

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<sup>4</sup>*Commonwealth v. Kenney*, 53 Mass. (12 Met.) 235, 46 Am. Dec. 672, 674 (1847).

<sup>5</sup>*Compare Doyle v. Ohio*, 96 S. Ct. 2240 (1976), discussed at note 6 *infra*, holding that post-arrest silence of the accused in face of *police accusations* cannot be used against a defendant even for impeachment purposes. McCormick's treatise sets forth, in hypothetical form, facts similar to *Lukas*:

Suppose X has been taken into custody for the murder of Y. X is sitting in the police station prior to booking, and Y's widow passes by. She sees X, becomes hysterical, and shouts, "Why did you have to kill my husband?" X says nothing and stares at his feet.

MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 161, at 354 (2d ed. 1972) [hereinafter cited as MCCORMICK].

The authors point out that "custody clearly exists but (assuming that the police had no part in arranging the confrontation between X and Y's widow) there might well not be 'interrogation.'" *Id.* See also *United States v. LoBiando*, 135 F.2d 130 (2d Cir. 1943).

<sup>6</sup>96 S. Ct. 2240 (1976).

<sup>7</sup>422 U.S. 171 (1975), noted in 1975 *Survey of Indiana Law*, *supra* note 2, at 257.

<sup>8</sup>Justice Stevens, dissenting in *Doyle*, cogently exposes the defects of the majority's reasoning. He first notes that *Miranda v. Arizona*, 384 U.S. 346 (1966), does not require the state to warn the accused that his silence will not be used against him. Therefore there is nothing unfair about using the silence in a case such as *Doyle*, in which the defendant's silence at the time of arrest was inconsistent with his trial testimony that he was the unwitting victim of a frame-up. If the defendant had been



The Court noted, however, that post-arrest silence can be used to contradict a defendant who testifies to an exculpatory version of the facts and claims to have told the police the same version upon arrest.<sup>9</sup> In that situation, the earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest.<sup>10</sup>

In *Fletcher v. State*<sup>11</sup> the Indiana Supreme Court granted transfer to review a decision of the court of appeals that impeachment by use of prior crimes is rendered harmless error when the trial is to the court sitting without the intervention of a jury. The court of appeals relied on the presumption that in judge-tried cases the trial judge knows the rules of evidence and will ignore evidence improperly admitted in reaching his judgment.<sup>12</sup> Since the defendant in *Fletcher* specifically advised the trial court that he was relying on a ruling of the Indiana Supreme Court, and the trial court held the questioning permissible, the presumption above is inapplicable. The court decided on the merits that cross-examination of the defendant concerning a conviction of theft was permissible under the landmark case of *Ashton v. Anderson*.<sup>13</sup> Without elaborate reasoning, the court held that a conviction of theft is one involving "dishonesty or false statement," admissible under the *Ashton* rule.

Conduct which would sustain a conviction for theft under the current Offenses Against Property Act<sup>14</sup> would previously have sustained a conviction for any of several crimes, including grand larceny, petit larceny, larceny by trick, obtaining property by false pretenses, blackmail, embezzlement, and receiving stolen property. The court rejected as too cumbersome any procedure which would require the trial court to probe the record of the

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framed, his failure to mention it at the time of arrest is almost inexplicable; therefore under the general rule concerning failure to respond as a tacit admission, the silence is admissible to impeach.

<sup>9</sup>96 S. Ct. at 2245 n.11.

<sup>10</sup>*Citing* United States v. Fairchild, 505 F.2d 1378, 1383 (5th Cir. 1975).

<sup>11</sup>340 N.E.2d 771 (Ind. 1976), *granting transfer from* 323 N.E.2d 261 (Ind. Ct. App. 1975), *noted in* 1975 *Survey of Indiana Law*, *supra* note 2, at 259.

<sup>12</sup>*King v. State*, 292 N.E.2d 843 (Ind. Ct. App. 1973), *noted in Evidence*, 1973 *Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 176, 210 (1973) [hereinafter cited as 1973 *Survey of Indiana Law*].

<sup>13</sup>258 Ind. 51, 279 N.E.2d 210 (1972), *noted in* 1973 *Survey of Indiana Law*, *supra* note 12, at 187-89. *Ashton* was made applicable to criminal cases in *Dexter v. State*, 260 Ind. 608, 297 N.E.2d 817 (1973), *noted in* 1974 *Survey of Indiana Law*, *supra* note 2, at 203.

<sup>14</sup>IND. CODE §§ 35-17-5-1 to -14 (Burns 1975) (repealed effective July 1, 1977).

witness's prior theft conviction to ascertain the common law equivalent. The court did not preclude the possibility that, in a case in which the prior theft conviction arose from facts which did not indicate a lack of veracity on the part of the witness, counsel could make those facts known to the trial court through a pretrial motion in limine, thereby allowing the court an opportunity to exclude, in its discretion, any reference to such conviction.

In *Snelling v. State*,<sup>15</sup> the court of appeals held that cross-examination of the defendant regarding a prior conviction for theft by deception was proper even though the conviction was pending on appeal. The court followed the majority of courts, which hold a conviction extinguishes the presumption of innocence and that the judgment holds fast until it is reversed.

In *Berridge v. State*,<sup>16</sup> the court of appeals held that testimony of a co-conspirator that he had pleaded guilty to the charge of conspiring with the defendant Berridge to defraud the City of Evansville was admissible as impeachment but not as substantive evidence as an admission. The general rule allows into evidence statements of co-conspirators made during the course of the conspiracy as an admission applicable to all fellow conspirators. Once the conspiracy case has ended, as in *Berridge*, the statements are objectionable as hearsay.

In *Patterson v. State*<sup>17</sup> hearsay was defined as testimony of a statement made out of court, such statement being offered as an assertion to show the truth of the matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter. The *Patterson* court made it clear that there is no reason to exclude statements made out of court on the basis of a hearsay objection when the declarant is in court and available for cross-examination. The *Berridge* court found, nevertheless, that the co-conspirator's guilty plea was not admissible as direct proof of the conspiracy because it was not material to the issue of defendant's guilt.<sup>18</sup> Of course, the evidence is highly material, so much so that it is deemed prejudicial to the defendant on the ground that he will be convicted on the basis of his co-conspirator's guilt. The exclusion as substantive evidence arises as a matter of federal constitutional law, not because the evidence is not material. An analogous situation is that created by *Miranda v. Arizona*.<sup>19</sup> Statements given in absence of the warnings are

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<sup>15</sup>337 N.E.2d 829 (Ind. Ct. App. 1975).

<sup>16</sup>340 N.E.2d 816 (Ind. Ct. App. 1976).

<sup>17</sup>324 N.E.2d 482 (Ind. 1975), noted in 1975 *Survey of Indiana Law*, *supra* note 2, at 239-42.

<sup>18</sup>Citing *United States v. Toner*, 173 F.2d 140 (3d Cir. 1949).

<sup>19</sup>384 U.S. 436 (1966).

not admissible as admissions as substantive evidence, but such statements may be used to impeach a defendant whose subsequent testimony is inconsistent with the prior statement.<sup>20</sup> The court reached the correct result, but its characterization of the evidence as "not material" does not comport with common understanding.

### B. Original Document Rule

The court of appeals in *Wilson v. State*<sup>21</sup> adopted Federal Rule of Evidence 1003,<sup>22</sup> holding that a duplicate of a document is admissible in evidence "to the same extent as an original unless a genuine issue is raised as to the authenticity of the original, or under the circumstances existing it would be unfair to admit the duplicate as an original."<sup>23</sup> In *Wilson* the defendant was accused of stealing a payroll check from a caseworker at her place of employment in the office of the Calumet Township (Lake County) Trustee. On appeal the state attempted to justify introduction of a xerox copy of the payroll check as a public record pursuant to Indiana Code section 34-1-17-7<sup>24</sup> which provides for introduction of public records via attestation by the keeper. In *Wilson* the court questioned whether the check qualified as a public record; in any case, there was no attestation. Neither could the court find the check admissible pursuant to the business

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<sup>20</sup>See *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971).

<sup>21</sup>348 N.E.2d 90 (Ind. Ct. App. 1976).

<sup>22</sup>FED. R. EVID. 1003 provides:

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

<sup>23</sup>348 N.E.2d at 95.

<sup>24</sup>IND. CODE § 34-1-17-7 (Burns 1973) provides:

Exemplifications or copies of records, and records of deeds and other instruments, or of office books or parts thereof, and official bonds which are kept in any public office in this state, shall be proved or admitted as legal evidence in any court or office in this state, by the attestation of the keeper of said records, or books, deeds or other instruments, or official bonds, that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody, and the seal of the office of said keeper thereto annexed if there be a seal, and if there be no official seal, there shall be attached to such attestation, the certificate of the clerk, and the seal of the circuit or superior court of the proper county where such keeper resides, that such attestation is made by the proper officer.

records exception provided in Indiana Code sections 34-3-15-1 to -3.<sup>25</sup>

The court was then faced with the objection that evidence of a copy of a document or writing is inadmissible until the absence of the original is accounted for by reason other than the serious fault of the proponent.<sup>26</sup> Reviewing Indiana cases which have allowed "duplicate originals" in evidence without accounting for the original,<sup>27</sup> the court noted that those decisions all involved copies produced simultaneously. The importance of that fact is not the time of production, however, but the assurance of trustworthiness. The court therefore held:

[A] duplicate of a document or other writing is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical, electronic or chemical reproduction or other equivalent technique which accurately reproduces the original.<sup>28</sup>

As noted at the outset, the original need not be accounted for

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<sup>25</sup>IND. CODE §§ 34-3-15-1 to -3 (Burns 1973) provide:

Any business may cause any or all records kept by such business to be recorded, copied or reproduced by any photographic, photostatic or miniature photographic process which correctly, accurately and permanently copies, reproduces or forms a medium for copying or reproducing the original record on a film or other durable material, and such business may thereafter dispose of the original record.

Any such photographic, photostatic or miniature photographic copy or reproduction shall be deemed to be an original record for all purposes and shall be treated as an original record in all courts or administrative agencies for the purpose of its admissibility in evidence. A facsimile, exemplification or certified copy of any such photographic copy or reproduction shall, for all purposes, be deemed a facsimile, exemplification or certified copy of the original record.

For all purposes of this act [34-3-15-1—34-3-15-3] "business" shall mean and include such business, bank, industry, profession, occupation and calling of every kind.

<sup>26</sup>MCCORMICK, *supra* note 5, § 230, at 560.

<sup>27</sup>Pittsburgh C.C. & St. L. Ry. Co. v. Brown, 178 Ind. 11, 98 N.E. 625 (1912); Federal Union Sur. Co. v. Indiana Mfg. Co., 176 Ind. 328, 95 N.E. 1104 (1911); Town of Frankton v. Closser, 107 Ind. App. 193, 20 N.E.2d 216 (1939); Watts v. Geisel, 100 Ind. App. 92, 194 N.E. 502 (1935).

<sup>28</sup>348 N.E.2d at 95. This language is almost identical to FED. R. EVID. 1001(4), which provides:

A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original.

unless a genuine issue of its authenticity is raised or admission of the duplicate would be unfair. The court explained that "unfair" refers to cases in which the duplicate is not fully legible or where only a portion of the total original document is offered and the remainder would be useful for cross-examination or might qualify the portion offered.<sup>29</sup>

The decision is a sound one, given the common understanding and acceptability of xerox and other copies as accurate representations of the original document. The decision also follows the continuing trend by Indiana courts to follow the Federal Rules of Evidence.<sup>30</sup>

### C. Judicial Notice

The Supreme Court of Indiana sua sponte rendered an opinion<sup>31</sup> declaring parts of Public Laws 305<sup>32</sup> and 309<sup>33</sup> invalid because they required judges of the newly-created county courts and the small claims division of the Superior Court of Vanderburgh County to take judicial notice of municipal, city, and town ordinances. The court held the provisions invalid because they prescribe procedures contrary to those previously adopted by the supreme court.<sup>34</sup> The law of Indiana is established that "courts do not take judicial notice of ordinances of incorporated towns, and, where suit is predicated on such an ordinance, so much of the

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<sup>29</sup>Similar examples are given in Proposed Fed. R. Evid. 1003 (Advisory Committee's Note), 56 F.R.D. 183, 343 (1972), citing *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964); *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418 (2d Cir. 1959).

<sup>30</sup>See *Patterson v. State*, 324 N.E.2d 482 (Ind. 1975), noted in 1975 *Survey of Indiana Law*, supra note 2, at 239-42, which adopted the rule that prior inconsistent statements of a witness are admissible as substantive evidence, with reference to FED. R. EVID. 801(d)(1); *Rieth-Riley Constr. Co. v. McCarrell*, 325 N.E.2d 844 (Ind. Ct. App. 1975), noted in 1975 *Survey of Indiana Law*, supra at 245-47, which held that a witness may give an opinion about an ultimate question to be decided by the trier of fact, with reference to FED. R. EVID. 704. Note also IND. CODE §§ 34-3-15.5-1 to -4 (Burns Supp. 1976), noted in 1975 *Survey of Indiana Law*, supra at 248-49, which provide that computer printouts of hospital records are admissible as original records. FED. R. EVID. 1001(3) provides that all computer printouts are original documents.

<sup>31</sup>In *Re Public Law No. 305 & Public Law No. 309*, 334 N.E.2d 659 (Ind. 1975). For discussions of this case from other viewpoints, see Harvey, *Civil Procedure*, supra at 88, 107 and Marsh, *Constitutional Law*, supra at 129.

<sup>32</sup>IND. CODE § 33-10.5-7-4 (Burns Supp. 1976).

<sup>33</sup>*Id.* § 33-5-43.1-12.

<sup>34</sup>*Id.* § 34-5-2-1 (Burns 1973), providing that procedural rules and cases decided by the courts take precedence over a statute concerning a procedural matter.

same as relates to the action must be made part of the complaint."<sup>35</sup>

Indiana Code section 33-11.6-4-11 provides that the Marion County Superior Court take judicial notice of such ordinances. It was also declared invalid. The court pointed out that courts do not take judicial notice of ordinances because many cities and towns lack an organized codification of municipal ordinances, and it would be virtually impossible for a trial judge to stop his case load to search for obscure ordinances.

The curious procedure for establishing the sex of a defendant formulated in *Sumpter v. State*<sup>36</sup> was clarified in a subsequent appeal of that case to the supreme court after remand.<sup>37</sup> The earlier decision held that when an individual is charged with an offense an element of which is the sex of the accused, the presiding judge may take judicial notice of the defendant's sex. The judge's finding is not necessarily conclusive; once the judge takes judicial notice of the defendant's sex, a rebuttable presumption arises sufficient to constitute a prima facie case in favor of the state.<sup>38</sup>

On remand the trial judge without intervention of a jury held a hearing at which he took judicial notice of the defendant's sex. The defendant rejoined by offering into evidence selected portions of a medical treatise describing various genetic and pathological conditions which make it difficult (if not impossible) to determine an affected individual's sex by external physical observation. Finding this evidence insufficient to rebut the presumption, the trial court entered judgment. The supreme court, indicating that the trial judge and the parties had assumed that the appellant was not entitled to a trial by jury on the issue of her sex, clearly held that the right exists.

The court said that the party against whom the fact is noticed must be permitted an opportunity to demonstrate that the fact is not true or a denial of due process results. Once the defendant challenges the presumption by introducing competent evidence, the presumption passes forever from the case. By affirmative evidence the state must then establish the defendant's sex

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<sup>35</sup>334 N.E.2d at 662, quoting *Indianapolis Traction & Terminal Co. v. Hensley*, 186 Ind. 479, 115 N.E. 934 (1917).

<sup>36</sup>261 Ind. 471, 306 N.E.2d 95 (1974), modifying on petition to transfer 296 N.E.2d 131 (Ind. Ct. App. 1973), noted in 1974 *Survey of Indiana Law*, *supra* note 2, at 216-17.

<sup>37</sup>*Sumpter v. State*, 340 N.E.2d 764 (Ind. 1976). Since the appeal arose from the supreme court's remand, the court of appeals transferred the case to the supreme court.

<sup>38</sup>306 N.E.2d at 99.

beyond a reasonable doubt to the satisfaction of the jury. While the determination on remand was made by the judge, the court affirmed the decision because it held defendant's evidence insufficient to dispute the presumption.

## XI. Insurance

*G. Kent Frandsen\**

During the survey period Indiana's appellate courts rendered several decisions of importance to attorneys practicing in the area of insurance law. Of most significant interest is the Indiana Supreme Court's decision affirming an award of punitive damages against an insurer. Decisions from the courts of appeals added a new dimension to the frequently litigated question of when coverage commences under a "conditional binding receipt" contained in an application for life insurance; clarified the scope of coverage of the "omnibus clause" in an automobile liability policy; and rejected the "legal interest" theory of insurable interest.

### *A. Punitive Damages*

*Vernon Fire & Casualty Insurance Co. v. Sharp*,<sup>1</sup> one of the more provocative cases decided by the Indiana Supreme Court this year, affirmed a First District Court of Appeals decision<sup>2</sup> that punitive damages are recoverable in a breach of contract action when there is a "mingling" of "tortious conduct" with the breach of contract.<sup>3</sup> The obscure and disputed portion of the opinion, at least among the supreme court justices, revolves around the question of whether it is essential to find all of the elements of a

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<sup>1</sup>349 N.E.2d 173 (Ind. 1976), also discussed in Gray, *Consumer Law*, *supra* at 148, Bepko, *Contracts and Commercial Law*, *supra* at 161.

<sup>2</sup>*Vernon Fire & Cas. Ins. Co. v. Sharp*, 316 N.E.2d 381 (Ind. Ct. App. 1974), discussed in Frandsen, *Insurance, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 260 (1975) [hereinafter cited as Frandsen, *1975 Survey*]; Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668, 681-86 (1975).

<sup>3</sup>349 N.E.2d at 180-81.

common law tort or merely a serious wrong, "tortious in nature," before an award of punitive damages may properly be assessed. Recognizing that Indiana follows the general rule that punitive damages are not recoverable in contract actions,<sup>4</sup> the court acknowledged that Indiana has allowed punitive damages to be awarded when an independent tort accompanies a breach of contract.<sup>5</sup> At this juncture, Justices Prentice and DeBruler disagreed with the majority on both the law and the facts of the case.<sup>6</sup>

The majority quoted Professor Corbin's language summarizing those situations in which a court may appropriately instruct a jury that an award of exemplary damages may be made even though the substandard conduct does not constitute an independent tort,<sup>7</sup> and then examined the record to find that the jury could have awarded punitive damages on two possible theories.<sup>8</sup> The jury might have found all of the elements of fraud in the inducement of the contract.<sup>9</sup> Alternatively, the jury might have failed

<sup>4</sup>*Id.* at 179, *citing* Hibschan Pontiac, Inc. v. Batchelor, 340 N.E.2d 377 (Ind. Ct. App. 1976), discussed in Bepko, *Contracts and Commercial Law*, *supra* at 163; Standard Land Corp. v. Bogardus, 154 Ind. App. 283, 289 N.E.2d 803 (1972); 11 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1340 (3d ed. 1968).

<sup>5</sup>349 N.E.2d at 180, *citing* Murphy Auto Sales, Inc. v. Coomer, 123 Ind. App. 709, 112 N.E.2d 589 (1953). *See* Physicians' Mut. Ins. Co. v. Savage, 296 N.E.2d 165 (Ind. Ct. App. 1973), discussed in Frandsen, *Insurance, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 217 (1974) [hereinafter cited as Frandsen, 1974 Survey]; Jeffersonville R.R. v. Rogers, 38 Ind. 116 (1871).

<sup>6</sup>349 N.E.2d at 185 (Prentice, J., dissenting).

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It can be laid down as a general rule that punitive damages are not recoverable for breach of contract, although in certain classes of cases, there has been a tendency to instruct the jury that they may award damages in excess of compensation and by way of punishment. These cases, however, are cases that contain certain elements that enable the court to regard them as falling within the field of tort or as closely analogous thereto.

*Id.* at 180, *quoting from* 5 A. CORBIN, CORBIN ON CONTRACTS § 1077, at 438-39 (1964) (emphasis by the court).

<sup>8</sup>The court also implied that appellant had committed a breach of duty. *See* 349 N.E.2d at 185. Justice Prentice, dissenting, pointed out that the statute which the appellant may have violated, IND. CODE § 27-1-22-18 (Burns 1975), not only prohibits extraction of an unauthorized premium but also defines the prohibited act as a criminal offense. The rule in Indiana is that punitive damages are not permissible if an act is also subject to criminal punishment. 349 N.E.2d at 200 (Prentice, J., dissenting).

For other cases suggesting that punitive damages are proper in cases of statutory torts, *see* Jeffersonville R.R. v. Rogers, 38 Ind. 116 (1871); Rex Ins. Co. v. Baldwin, 323 N.E.2d 270, 274 (Ind. Ct. App. 1975).

<sup>9</sup>349 N.E.2d at 184. However, the majority opinion reiterated no facts from which the jury might have found all of the elements of actionable fraud. *Id.* at 193-94 (Prentice, J., dissenting).



to find all of the essential elements of a recognized tort but decided that the insurer committed a "serious intentional wrong" by refusing to pay proceeds for which it was admittedly liable<sup>10</sup> because of its "interested motive" of exacting "additional consideration" in the form of a release from a claim by one of the insured's employees.<sup>11</sup> The court characterized such action as "oppressive conduct"<sup>12</sup> and held it to be sufficient to support punitive damages for breach of contract unaccompanied by an independent tort.<sup>13</sup>

The rule of *Vernon* will clearly not apply when an insurer in good faith disputes the amount of liability to the insured.<sup>14</sup> All of the justices agreed that there was a bona fide dispute in *Vernon* and found error in the trial court's denial of a directed verdict on the part of the complaint alleging "bad faith." However, a good faith dispute may become oppressive when it is used as a subterfuge or accompanied by misconduct beyond the permissible limits of a disagreement over the terms of a contract, as in *Vernon*.

It seems to this writer that the majority of the court perceives a particular repugnance in situations in which parties subject to state licensing and regulations conduct their affairs and dealings with the public in an oppressive manner, wrongfully using their superior bargaining positions to their own advantage.<sup>15</sup> Thus, when such a party's breach of contract coalesces with substandard conduct, public policy reasons for limiting the remedy to compensatory and consequential damages should give way to

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<sup>10</sup>*Id.* at 184. The insurers had conceded, before trial, that they were liable for a portion of the proceeds, but disputed the amount. 316 N.E.2d at 383.

<sup>11</sup>349 N.E.2d at 184. Evidence revealed that the insurer had attempted to coerce the plaintiff into securing the release as a condition of settlement. *Id.* at 183.

<sup>12</sup>*Id.* at 184.

<sup>13</sup>See also *Jones v. Abriani*, 350 N.E.2d 635 (Ind. Ct. App. 1976), discussed in Gray, *Consumer Law*, *supra* at 149; *Bepko, Contracts and Commercial Law*, *supra* at 162 (punitive damages permissible when breach of sales warranty is accomplished by "fraudulent and oppressive conduct"); *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972) (a "fraudulent state of mind," without all elements of actionable fraud, will support an award of punitive damages).

<sup>14</sup>349 N.E.2d at 184. *Compare* *Rex Ins. Co. v. Baldwin*, 323 N.E.2d 270 (Ind. Ct. App. 1975), holding that an award of punitive damages is proper when an insurer refuses to pay a claim to which it has no valid defense. The court found that there was no actionable fraud but that the insurer's conduct was a "heedless disregard of the consequences." *Id.* at 273.

<sup>15</sup>See 349 N.E.2d at 184-85.

the public policy of deterring wrongful conduct. Exemplary damages in such cases are an appropriate vehicle for deterring the future conduct of the wrongdoers before the court and other persons in a similar situation.<sup>16</sup>

Although public policy is generally expressed by acts of the legislature,<sup>17</sup> the existence of statutory penalties for proscribed activities of insurers<sup>18</sup> should not be viewed as a limitation on the power of the appellate courts to impose monetary sanctions by way of punitive damages when the public's interest is paramount. In *Vernon*, the insured was "whipsawed" by two insurance companies, and such conduct is reprehensible, constitutes bad faith, and is the antithesis of the warranty of good faith implicit in all contracts of insurance.<sup>19</sup>

### B. Insurable Interest

A principle basic to almost all types of insurance is that of indemnity, the concept that one who sustains loss from a risk against which he has insured himself should be entitled to compensation or reimbursement only to the extent of his loss. The rationale for the rule is, of course, that insurance for an amount greater than that needed for compensation is likely to induce the evils of wagering or willful destruction of insured lives or prop-

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<sup>16</sup>*Id.* at 180.

<sup>17</sup>"The power of courts to declare a contract void for being in contravention of sound public policy is a very delicate and undefined power, and, like the power to declare a statute unconstitutional, should be exercised only in cases free from doubt." *American Underwriters, Inc. v. Turpin*, 149 Ind. App. 473, 477, 273 N.E.2d 761, 764 (1971), *quoting from* *Richmond v. Dubuque R.R.*, 26 Iowa 191, 202 (1868).

<sup>18</sup>IND. CODE § 27-4-4-5 (Burns 1975) provides for an award of attorneys' fees against unauthorized insurance companies that delay or refuse to make payment vexatiously or without reasonable cause. Other jurisdictions have statutory provisions for the assessment of civil penalties, including attorneys' fees, against insurance companies for failure to timely pay a claim without a just and reasonable ground. *See, e.g.*, FLA. STAT. ANN. § 626.911 (West 1972); KAN. STAT. ANN. § 40-908 (1973); LA. REV. STAT. ANN. § 22:657 (West Supp. 1976); MASS. ANN. LAWS ch. 175B, § 4 (Michie/Law. Co-op 1972).

<sup>19</sup>"An insurer owes to its insured an implied-in-law duty of good faith and fair dealing that it will do nothing to deprive the insured of the benefits of the policy." *Fletcher v. Western Nat'l Life Ins. Co.*, 10 Cal. App. 3d 376, 401, 89 Cal. Rptr. 78, 93 (1970).

In 1970, New York enacted an "unfair claim settlement practices by insurers" act. N.Y. INS. LAW § 40d (McKinney Supp. 1975-76). One of the practices condemned is "not attempting in good faith to effectuate prompt, fair and equitable settlements of claims submitted in which liability has become reasonably clear."

erty. Thus, the requirement has developed, by judicial decision in most states, that the insured must have an insurable interest in the life or property that is the subject of his insurance.<sup>20</sup> The development of the test of what is and who has an insurable interest has been long and arduous. Historically, an insurable interest existed when the interest or right was of such a nature as to be enforceable in the courts of law or equity. Generally, the insured was required to have title, a possessory interest, or a contract right in the property to be able to recover under a policy initially obtained to protect against the risk of loss. However, a competing doctrine, called the "factual expectation" theory, emerged in the early nineteenth century.<sup>21</sup> Although this doctrine was widely favored by text writers, it did not receive much judicial acceptance until the middle of the twentieth century.<sup>22</sup> The doctrine is attributed to statements in Judge Lawrence's opinion in *Lucena v. Crauford*,<sup>23</sup> wherein he concluded that the contract of insurance "is applicable to protect men against uncertain events which may in any wise be of disadvantage to them."<sup>24</sup> Lawrence's rationale was farsighted and, indeed, compatible with the realities of risk transference in today's industrial society.

It appears that the First District Court of Appeals has adopted the "factual expectation" theory. In *All Phase Construction Corp. v. Federated Mutual Insurance Co.*<sup>25</sup> the insurer rejected a subcontractor's claim for materials destroyed by fire at a construction site, contending that the subcontractor had no insurable interest in the materials. This contention was based on terms of the construction contract whereby the subcontractor relinquished title to the materials upon delivery to the project and agreed to waive all lien rights he might have in the project. Judge Robertson, author of the opinion, reasoned that although the existence or nonexistence of title and lien rights are helpful in determining whether an insurable interest exists, such evidence is not dis-

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<sup>20</sup>"Usually, American courts have turned to English precedents on insurable interest questions without explicit reference to the fact that the English cases were interpretations and applications of English statutes . . . ." R. KEETON, *INSURANCE LAW, BASIC TEXT* 97 (1971). For examples of state insurable interest statutes, see CAL. INS. CODE §§ 280-287, 300-305 (West 1972); N.Y. INS. LAW §§ 146-148 (McKinney 1966); TEX. REV. CIV. STAT. ANN. art. 3.49-1 (Vernon 1963).

<sup>21</sup>Harnett & Thornton, *Insurable Interest In Property: A Socio-Economic Reevaluation Of A Legal Concept*, 48 COLUM. L. REV. 1162, 1172 (1948).

<sup>22</sup>*Id.* at 1173-74.

<sup>23</sup>2 Bos. & P.N.R. 269, 127 Eng. Rep. 630 (H.L. 1805).

<sup>24</sup>*Id.* at 301, 127 Eng. Rep. at 642.

<sup>25</sup>340 N.E.2d 835 (Ind. Ct. App. 1976).

positive of the question. Distinguishing between an insurable interest and a legally enforceable property interest, the court quoted language from the Third District Court of Appeals decision in *Ebert v. Grain Dealers Mutual Insurance Co.*:<sup>26</sup>

Anyone has an insurable interest in property who derives a benefit from its existence or would suffer a loss from its destruction whether or not he has title or a secured interest in the property. A right of property is not essential. *Any limited or qualified interest or any expectancy of advantage is sufficient.*<sup>27</sup>

If the foregoing analysis of *All Phase* is correct, it follows that when an insured has made a full disclosure of his interest in the property to be protected under the policy, he may recover for loss even though he has no title, lien, or contract right in the property. His reasonable expectation of benefit from preservation of the property or loss from its damage will support recovery under the policy in the event of loss.<sup>28</sup>

### C. Casualty Insurance

#### 1. The Omnibus Clause

The term "omnibus clause" is ordinarily used to signify a provision of a liability insurance policy designating additional insureds by an expansive class description in terms of some relationship to the insured.<sup>29</sup> Although the term "omnibus" is seldom found in a policy, the clause typically appears under the caption "persons insured" or "definition of insured."<sup>30</sup> Indiana Code sec-

<sup>26</sup>303 N.E.2d 693 (Ind. Ct. App. 1973).

<sup>27</sup>*Id.* at 697 (emphasis added).

<sup>28</sup>"The usual rule customarily followed is that an interest exists when the insured derives pecuniary benefit or advantage by the preservation or continued existence of the property or will sustain pecuniary loss from its destruction." J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 2123, at 35-37 (1969).

<sup>29</sup>R. KEETON & J. O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* 583-84 (1965).

<sup>30</sup>The typical family automobile policy contains a provision similar to the following:

**Persons Insured**

Under the Liability and Medical Expense coverages, the following are insured:

- (a) with respect to an owned automobile,
  - (1) the named insured,
  - (2) *any other person using such automobile with the permission of the named insured, provided his actual operation or (if he is not operating) his other actual use thereof is within the scope of such permission, and . . .*

tion 27-1-13-7 requires the inclusion of the clause in all automobile liability policies issued or delivered in the state.<sup>31</sup> The statutory purpose is to extend coverage to those driving the insured vehicle with the permission of the named insured or additional insureds. The omnibus clause has been a source of frequent litigation, generally involving the questions of whether the use of the insured vehicle was with the express or implied permission of the insured or within the scope of the permission granted.

In the case of *Winkler v. Royal Insurance Co.*,<sup>32</sup> Alice Wolfe rented an automobile from Hertz Corporation in her name for the sole use of her husband's half brother, Dennis, who was not a member of her household. During Dennis' use of the rented vehicle, he was involved in a fatal collision which resulted in a wrongful death action against him by the decedent's personal representative. After a default judgment was entered against Dennis, the administratrix sued the insurer for the proceeds of the policy it had issued to Hertz Corporation on the leased vehicle.

The insurer refused to concede liability and, in support of its motion for summary judgment, asserted that the policy did not extend coverage to one outside the policy's definition of additional insureds;<sup>33</sup> and that the policy specifically excluded, *inter*

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<sup>31</sup>IND. CODE § 27-1-13-7 (Burns 1975) provides in part:

No such policy shall be issued or delivered in this state to the owner of a motor vehicle, by any domestic or foreign corporation . . . unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injury to persons or property resulting from negligence in the operation of such motor vehicle, in the business of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, expressed or implied of such owner. A policy issued in violation of this section shall, nevertheless, be held valid but be deemed to include the provisions required by this section, and when any provision in such policy or rider is in conflict with the provision required to be contained by this section, the rights, duties and obligations of the insurer, the policyholder and the injured person or persons shall be governed by the provisions of this section.

<sup>32</sup>337 N.E.2d 499 (Ind. Ct. App. 1975).

<sup>33</sup>The pertinent part of the insurance policy defining the insured read as follows:

The unqualified word 'insured' includes the named insured and also includes (1) Any person, firm, association, partnership or corporation to whom an automobile has been rented without a chauffeur by the named insured (herein referred to as the 'renter'); (2) Any employee of said renter (herein referred to as the 'driver'); (3) Any employer of said renter; (4) . . . (5) If the named insured is an individual, resident of the household of the named insured, . . .

*alia*, those persons who had not signed the rental agreement, were not regularly employed by lessee, or were not members of lessee's immediate family. There also was a novel tie-in between the liability policy and the rental agreement. The rental agreement provided that the leased vehicle was to be used only by certain designated persons including the lessee and the lessee's permittee, provided the permittee was a member of the lessee's immediate family, his employer or employee. The trial court found that since the driver did not fall within any of these categories he was not within the coverage afforded under the policy. Therefore, the insurer's motion for summary judgment was granted.

Although the First District Court of Appeals disposed of the case on procedural grounds, it is noteworthy that the policy apparently did not comply with statutory requirements for coverage of additional insureds.<sup>34</sup> The appellate courts have held that an insurer's use of policy language in derogation of a legislative mandate will be given no effect.<sup>35</sup> Also, under the most conservative of tests, both the insurance policy and the rental agreement were adhesion contracts.<sup>36</sup> Unless the prolix language of such agreements has been brought to the attention of and explained to

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(6) Any partner or executive officer of the renter; (7) If qualified licensed operators, members of the immediate family of the renter or of any partner or executive officer of the renter; (8) Any employee of the named insured while acting within the scope of his employment . . . .

337 N.E.2d at 501.

<sup>34</sup>See note 31 *supra*.

<sup>35</sup>*McNutt v. State Farm Mut. Auto. Ins. Co.*, 369 F. Supp. 381, 385 (W.D. Ky. 1973); *Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123, 1128 (S.D. W. Va. 1972); *Simpson v. State Farm Mut. Auto. Ins. Co.*, 318 F. Supp. 1152 (S.D. Ind. 1970), *discussed in* Frandsen, 1975 *Survey*, *supra* note 2, at 266; *Patton v. Safeco Ins. Co.*, 148 Ind. App. 548, 267 N.E.2d 859 (1971).

<sup>36</sup>A "contract of adhesion" is a standardized contract prepared entirely by one party, and which, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a "take it or leave it" basis without opportunity for bargaining and, under such conditions that the second party or "adherer" cannot obtain the desired product and service save by acquiescing in form of the agreement.

*Star Finance Corp. v. McGee*, 27 Ill. App. 3d 421, 426, 326 N.E.2d 518, 522, (1975).

See *Prudential Ins. Co. v. Lamme*, 83 Nev. 146, 147, 425 P.2d 346, 347 (1967), in which the court recognized "an insurance policy is not an ordinary contract. It is a complex instrument, unilaterally prepared, and seldom understood by the assured." See *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

the purchaser, neither the exclusions nor the forfeiting language of either should be binding on the insured<sup>37</sup> or on those to whom he has entrusted the vehicle.<sup>38</sup>

The issue in *State Farm Fire & Casualty Co. v. White*<sup>39</sup> was whether an automobile insurance carrier could avoid liability under the policy's omnibus clause when the insured vehicle was involved in a collision while being operated by a subpermittee of the named insured outside the scope of permission given to the initial permittee. The Third District Court of Appeals recognized that "permission of the named insured contemplates express or implied permission" and held the insurer liable.<sup>40</sup> Stating that Indiana applies the liberal rule in construing omnibus clause permission provisions,<sup>41</sup> the court further buttressed its decision by approving language from *Home Mutual Insurance Co. v. Automobile Underwriters, Inc.*<sup>42</sup> suggesting that coverage might be implied to the second, or subpermittee, when the owner has not expressly forbidden such delegation.

The insurer argued that the case at bar was clearly distinguishable from those cases interpreting typical omnibus clause provisions since the present policy's provisions specified that the permittee's use not only be with the named insured's permission, but also within the scope of such permission. The court simply noted that the phrase "within the scope of such permission" is dependent upon the question of "permission." Thus, a separate deliberative process to ascertain scope of permission is unnecessary once the trier of fact determines whether or not "permission, express or implied" has been given.<sup>43</sup>

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<sup>37</sup>Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971).

<sup>38</sup>For a thorough analysis of circumstances which permit the inference that the driver had permission to use the vehicle, see *Hays v. Country Mut. Ins. Co.*, 28 Ill. 2d 601, 192 N.E.2d 855 (1963). However, in 1973 the Supreme Court of Illinois rejected the tenuous factual distinctions recognized in *Hays* and adopted the "initial permission" test as enunciated in *Odolecki v. Hartford Acc. & Indem. Co.*, 55 N.J. 542, 264 A.2d 38 (1970), "once the initial permission has been given by the named insured, coverage is fixed, barring theft or the like." *Id.* at 550, 264 A.2d at 42.

<sup>39</sup>341 N.E.2d 782 (Ind. Ct. App. 1976).

<sup>40</sup>*Id.* at 784, citing *American Employers' Ins. Co. v. Cornell*, 225 Ind. 559, 76 N.E.2d 562 (1948).

<sup>41</sup>341 N.E.2d at 784.

<sup>42</sup>261 F. Supp. 402 (S.D. Ind. 1966).

<sup>43</sup>See, e.g., *Hays v. Country Mut. Ins. Co.*, 28 Ill. 2d 601, 192 N.E.2d 855 (1963).

## 2. *Actions for Loss of Consortium Under UMC*

In the case of *Spainhower v. Willis*,<sup>44</sup> the United States District Court for the Southern District of Indiana was presented with the issue of whether a wife may maintain an action under uninsured motorist coverage (UMC) of the family automobile policy for loss of consortium arising from her husband's injuries sustained in an automobile collision with an uninsured motorist. In support of a motion to dismiss the wife's action, the insurer contended that since she had not herself sustained bodily injuries, her claim for recovery under the UMC could not be maintained. Denying the motion, Judge Noland interpreted the applicable UMC provisions<sup>45</sup> to permit recovery when loss of consortium arises out of an injury which is itself compensable under UMC. The court relied upon a Florida case<sup>46</sup> which had construed a similar UMC provision to allow recovery on the theory that the purpose of UMC<sup>47</sup> is to substitute the insured's own carrier for the negligent and uninsured motorist. Further, in view of previous cases in which Indiana courts have consistently held that UMC is

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<sup>44</sup>Cause No. EV 75-123-C (S.D. Ind. Feb. 9, 1976).

<sup>45</sup>The provision provided, in part, as follows:

UNINSURED MOTORISTS COVERAGE

.....

To pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury sustained by the insured, caused by accident and arising out of the ownership, maintenance or use of such uninsured automobile . . . .

Complaint Appendix at 3, *Spainhower v. Willis*, Cause No. EV 75-123-C (S.D. Ind. Feb. 9, 1976).

The policy went on to define an "insured" under UMC as including:

a. The named insured and any relative . . . .

.....

c. any person with respect to damages he is entitled to recover for care or loss of services because of bodily injury to which this coverage applies.

*Id.*

The policy designated the husband as the "named insured" and provided further that his wife was included as an insured if she was a resident of the same household. *Id.*

<sup>46</sup>*Mobley v. Allstate Ins. Co.*, 276 So. 2d 495 (Fla. Ct. App. 1973).

<sup>47</sup>For a general discussion of the purpose of UMC see 7 AM. JUR. 2d *Automobile Ins.* § 135, at 461 (1961) wherein it is stated:

The purpose of the statute making UMC compulsory, it has been said, is to give the same protection to a person injured by an uninsured motorist as he would have had if he had been injured in an accident caused by an automobile covered by a standard liability insurance policy.

See also Frandsen, *Insurance, 1974 Survey, supra* note 5, at 219-21.



remedial in nature,<sup>48</sup> damages for loss of consortium should be as fully compensable under UMC as damages for other types of personal injuries.<sup>49</sup>

### 3. *Duty to Discover Errors in Application*

It is clear that an insurer may rescind a policy procured by an applicant through misrepresentations or the concealment of facts that are material to the risk.<sup>50</sup> However, an insurer may be estopped from asserting the grounds necessary to effect a rescission if its own wrongful or negligent conduct would make rescission inequitable.<sup>51</sup> This latter principle was at issue in *State Automobile Mutual Insurance Co. v. Spray*,<sup>52</sup> a declaratory judgment action brought in the United States District Court for the Southern District of Indiana. State Auto sought a declaration that its automobile policy issued to Spray was void because of the insured's false representations of material facts on the policy application and, therefore, that the company had no duty to defend or to assume any liability for the insured in a state court action for injuries arising out of an automobile accident.

On the policy application, the insured had stated that during the past three years he had not been a resident of Indiana and had not been convicted of a moving traffic violation or involved in an automobile accident. He further stated that during the three years his driver's license had not been revoked, suspended, or restricted. The court found that all of these representations were false.

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<sup>48</sup>See, e.g., *State Farm Mut. Auto Ins. Co. v. Robertson*, 295 N.E.2d 626, 628-29 (Ind. Ct. App. 1973); *Cannon v. American Underwriters, Inc.*, 150 Ind. App. 21, 22, 275 N.E.2d 567, 568 (1971). See also Frandsen, *Insurance*, 1974 *Survey*, *supra* note 5, at 221 & n.18.

<sup>49</sup>For somewhat analogous cases recognizing that parents may maintain an action against their UMC carrier for damages arising out of the wrongful death of their children resulting from the negligence of an uninsured motorist, see *State Farm Mut. Auto Ins. Co. v. Selders*, 187 Neb. 342, 190 N.W.2d 789 (1971); *Brummett v. Grange Ins. Ass'n*, 4 Wash. App. 979, 485 P.2d 88 (1971); see also Annot., 26 A.L.R.3d 935, 938 (1969).

<sup>50</sup>*Prentiss v. Mutual Benefit Health & Acc. Ass'n*, 109 F.2d 1 (7th Cir.), *cert. denied*, 310 U.S. 636 (1940). *Brunnemer v. Metropolitan Life Ins. Co.*, 213 Ind. 650, 14 N.E.2d 97 (1938); *Automobile Underwriters, Inc. v. Stover*, 148 Ind. App. 555, 268 N.E.2d 114 (1971); *Indiana Ins. Co. v. Knoll*, 142 Ind. App. 506, 236 N.E.2d 63 (1968).

<sup>51</sup>See, e.g., *Hoosier Ins. Co. v. Ogle*, 150 Ind. App. 590, 276 N.E.2d 876 (1971); *West v. Indiana Ins. Co.*, 148 Ind. App. 176, 264 N.E.2d 335 (1970); *Metropolitan Life Ins. Co. v. Head*, 86 Ind. App. 326, 157 N.E. 448 (1927).

<sup>52</sup>Cause No. NA 75-55-C (S.D. Ind. Feb. 3, 1976), *appeal docketed* No. 75-1338 (7th Cir. Feb. 23, 1976).

It is indisputable that such representations are material to the risk to be assumed by the insurer and, generally speaking, the insured's falsehoods would have permitted State Auto to rescind the policy.<sup>53</sup> However, in accordance with its standard practice, State Auto had conducted a routine investigation to obtain additional personal and financial information concerning the applicant. The investigation had revealed that the insured had not been a resident at the Florida address listed on the application and, apparently, had never resided in Florida. Although this information was discovered by State Auto representatives less than one month after the policy had been issued and more than four months prior to the accident in question, State Auto failed to make any further investigation concerning the insured.

It is generally held that if an insurer possesses evidence of false representations sufficient to place a prudent man on notice and cause him to begin an inquiry which might disclose the truth, the insurer is bound by what a reasonable inquiry would have revealed and is estopped from asserting the defense of false representations of material facts.<sup>54</sup> The court applied this principle, concluding that an insured's recent place of residence is an important link in the inquiry of whether he may be an acceptable risk. Had State Auto investigated the false statement of the insured's residence, it could have discovered the other misrepresentations contained in the application and taken steps to rescind the policy before the occurrence of the accident.

*State Auto* is a significant decision because the court recognized that the "public interest" requires automobile liability insurers to inquire into apparent misstatements in applications for coverage so that the public may be protected from irresponsible

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<sup>53</sup>Before the insurer may rescind an automobile liability policy because of a representation made by the insured in his application, the representation must be one which might reasonably influence the insurer in deciding whether to accept the risk. *See Auto. Underwriters, Inc. v. Stover*, 148 Ind. App. 555, 268 N.E.2d 114 (1971). The test of materiality in Indiana "is not that the company was influenced, but that the facts if truly stated might reasonably have influenced the company in deciding whether it should accept or reject the risk." *New York Life Ins. Co. v. Kuhlenschmidt*, 218 Ind. 404, 420, 33 N.E.2d 340, 347 (1941).

<sup>54</sup>*Adamson v. Home Life Ins. Co.*, 508 F.2d 766 (5th Cir. 1975); *see Union Ins. Exchange, Inc. v. Gaul*, 393 F.2d 151 (7th Cir. 1968), in which the court cited and applied Indiana law in refusing to allow an automobile liability insurer to rescind its policy under facts somewhat similar to those in *State Auto*.

drivers to the greatest possible extent.<sup>55</sup> Although insurers generally are not required to make independent investigations of the applicant's representations,<sup>56</sup> if an investigation is made and material misrepresentations come to light the insurer is obligated to conduct a further inquiry and will be charged with notice of what the subsequent inquiry would have disclosed.<sup>57</sup>

#### D. Life Insurance Conditional Receipt

In a case likely to accelerate the use of "COD" insurance<sup>58</sup> in Indiana, the First District Court of Appeals ruled that when consideration supports the issuance of a conditional receipt for life insurance, death of the applicant prior to notification of rejection imposes liability on the insurer for the amount of the proceeds stated in the application. In *Kaiser v. National Farmers Union Life Insurance Co.*,<sup>59</sup> the plaintiff's decedent applied for a whole life policy and paid the first year's premium on June 30, and was given a conditional receipt providing that insurance coverage under the policy would be effective if on a specified date the company deemed him to be an insurable risk. On July 11, the applicant submitted to the required medical examination. On July 20, he was killed in an automobile accident, prior to the insurer's formal acceptance or rejection of his application. The trial court strictly interpreted the language of the receipt<sup>60</sup> and held that

<sup>55</sup>When an automobile liability insurer issues a policy, it assumes an obligation to investigate the insurability of its insured. The insurer may not postpone an investigation until the insured injures another nor may it employ a second investigation, prompted by imminence of claim, to avoid its policy. Public policy militates against such a proposition. *Travelers Ins. Co. v. Wilhelm*, [1973] INSUR. L. REP. (CCH) 7757 (D. Mont. 1973).

<sup>56</sup>*Mutual Life Ins. Co. v. Moriarity*, 178 F.2d 470 (9th Cir. 1949). See also *Chamberlain v. Fuller*, 59 Vt. 247, 9 A. 832 (1887), wherein the court recognized, "No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." *Id.* at 256, 9 A. at 836.

<sup>57</sup>In *Knights of Pythias v. Kalinski*, 163 U.S. 289 (1895), the Court held that an insurance company may be charged with knowledge of facts which it ought to have known and that knowledge which is sufficient to lead a person to inquire further constitutes notice of whatever the inquiry would have disclosed and will be regarded as knowledge of the facts. See *Columbia Nat'l Life Ins. Co. v. Rodgers*, 116 F.2d 705 (10th Cir. 1941).

<sup>58</sup>Absent a contrary agreement (the conditional receipt, for example) payment of the initial premium and delivery of the policy are usually concurrent acts. Therefore, during the period between the signing of the application and the delivery of the policy, no money has been advanced to the insurance company, and no insurance is in effect. This is called "COD", or "cash on delivery" insurance.

<sup>59</sup>339 N.E.2d 599 (Ind. Ct. App. 1976).

<sup>60</sup>See *Prudential Ins. Co. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967) for a discussion of the two types of conditional receipts in common usage,

there was no coverage at the time of decedent's death; the insurer had not approved the application since it was attempting to obtain additional information on the applicant's "insurability."<sup>61</sup> Reversing the trial court's decision, the court of appeals ruled that the conditional receipt has the effect of creating temporary or interim insurance until the company makes a final decision to accept or reject the application. In a persuasive opinion, Judge Lybrook reasoned that to construe the terms of the receipt to create no obligation until after the insurer's approval would be to overlook the patent ambiguity of the language contained in the receipt;<sup>62</sup> deprive the applicant of his reasonable expectations;<sup>63</sup> and, if the policy is ultimately issued, extract a premium for coverage not received,<sup>64</sup> between payment of premium and issuance of the policy. Thus, when a conditional receipt supported by consideration is issued by a life insurer, any conditions contained in the receipt are to be treated as conditions subsequent. Therefore, the insurer must act on the application and cannot terminate the risk until the insured is notified during his lifetime. Since the insurer did not reject Kaiser's application prior to his death, it was liable for the amount of the proceeds stated in the application.

It is imperative that courts understand, as did the court of appeals in *Kaiser*, that "freedom to contract" must not be used as a shibboleth permitting an insurer to bargain with instruments of confusion, technically adequate to meet the requirements of precision recognized in ordinary contracts among parties of equal bargaining power,<sup>65</sup> when, in fact, the applicant for insurance does not have equality of bargaining power.<sup>66</sup>

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the "approval type" and the "insurability type." The receipt in *Kaiser* was an "insurability type." 339 N.E.2d at 600.

<sup>61</sup>The courts have recognized that "insurability" includes elements other than health. See *Rosenbloom v. New York Life Ins. Co.*, 65 F. Supp. 692, 696 (W.D. Mo. 1946), wherein the court stated, "Insurability as a term of art signifies all those physical and moral factors reasonably taken into consideration by life insurance companies in determining coverage or matters affecting the risk"; *Kallman v. Equitable Life Assur. Soc'y*, 248 App. Div. 146, 288 N.Y.S. 1032 (1936). Note the strong dissent in *Casey v. Transamerica Life Ins. & Ann. Co.*, 511 F.2d 577, 580 (7th Cir. 1975) (Pell, J., dissenting).

<sup>62</sup>*Allen v. Metropolitan Life Ins. Co.*, 44 N.J. 294, 208 A.2d 638 (1965).

<sup>63</sup>*Prudential Life Ins. Co. v. Lamme*, 83 Nev. 146, 425 P.2d 346 (1967).

<sup>64</sup>*Stonsz v. Equitable Life Assur. Soc'y.*, 324 Pa. 97, 187 A. 403 (1936).

<sup>65</sup>*Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 601 (2d Cir. 1947).

<sup>66</sup>The Third District Court of Appeals reached the same decision as the *Kaiser* court in *Monumental Life Ins. Co. v. Hakey*, 354 N.E.2d 333 (Ind. Ct. App. 1976).

## XII. Labor Law

*Edward P. Archer\**

Significant cases decided by Indiana courts in the 1975 term indicate that the body of labor law cases can be expected to expand significantly in oncoming years, especially in the uncharted public sector.

The most significant Indiana decision in the field of labor law during the survey period was that of the Benton Circuit Court in *Benton Community School Corp. v. Indiana Education Employment Relations Board*,<sup>1</sup> in which the court held the Indiana Public Employee Bargaining Act<sup>2</sup> unconstitutional and enjoined the Indiana Education Employment Relations Board from further proceedings under that Act. The decision has completely halted the Board's application of both election and unfair labor practice procedures to public employee bargaining in Indiana.<sup>3</sup> The court held the entire Act to be void as a violation of article 1, section 12 of the Indiana Constitution,<sup>4</sup> in that section 7 of the Act, prohibiting judicial review of Board determinations made in representation proceedings, is unconstitutional and not severable from the remaining portions of the Act. At this writing briefs have been filed with the Indiana Supreme Court appealing the circuit court's decision; therefore, a determination of the constitutionality of the Bargaining Act should be made within the next year.

A beginning of case-by-case development of public sector labor relations law appeared in *County Department of Public Welfare v. City-County Council*.<sup>5</sup> This was an action by the Marion

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The author extends his appreciation to Mark A. Pope and Barbara Brigham for their assistance in preparation of this discussion.

<sup>1</sup>No. C75-141 (Benton Cir. Ct. Feb. 4, 1976).

<sup>2</sup>IND. CODE §§ 22-6-4-1 to -13 (Burns Supp. 1976).

<sup>3</sup>Teachers are covered by an entirely different statute [IND. CODE §§ 20-7.5-1-1 to -14 (Burns 1975)] and so teacher bargaining has not been affected by this decision.

<sup>4</sup>IND. CONST. art. 1, § 12, provides:

All courts shall be open; and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

<sup>5</sup>338 N.E.2d 656 (Ind. Ct. App. 1975).

County Welfare Department to mandate the City-County Council to effectuate a salary increase for department employees. The applicable Indiana statute provides that "the county council shall establish the compensation of the [department employees] within the salary ranges of the pay plan adopted by the Indiana personnel board and approved by the state budget committee . . . ."<sup>6</sup>

On April 19, 1974, the Indiana personnel board and the state budget agency approved a seven and one-half percent increase in the pay of department employees. Two months later the Marion County Welfare Director appeared before the council and requested adoption of this increase. The council refused to effect the increase for the remainder of 1974 but, at its regular budget meeting in September 1974, approved the increase for 1975. This suit was filed by the Welfare Department to compel the council to establish the increase for the remainder of 1974.

The court held that the council was under a statutory duty to effectuate the increase, but that the statute did not state when the council must take action. Under Indiana Code section 17-1-24-18.3 the "council shall, at its prescribed annual meeting beginning on the first Tuesday after the first Monday in September of each year . . . adopt a separate ordinance fixing the salaries of all [employees]." The court concluded that the council was under no statutory duty to conform to state-adopted pay plans at any time other than the regular date for adoption of all county salary schedules. The court also noted statutory language which provided that employee salaries "may be changed at any time"<sup>7</sup> and concluded that the council had discretion to implement the increases in mid-budget year. Further, the court noted that the state personnel director, in announcing the increase, had stated: "These salary increases may be effective on May 1, 1974, July 1, 1974, October 1, 1974, or January 1, 1975, as funds become available and as you receive approval from your County Welfare Board and County Council."<sup>8</sup>

In this case the statutory language was clear and the court was not confronted with the perplexing problem of division of power between the judicial and legislative branches. Implicit in the court's opinion was the conclusion that the legislature has authority to compel county councils to adopt and appropriate

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<sup>6</sup>IND. CODE § 17-1-24-18.1 (Burns 1974).

<sup>7</sup>*Id.* § 17-1-24-18.3 (Burns Supp. 1976).

<sup>8</sup>*Id.*

<sup>9</sup>338 N.E.2d at 659.

funds for budgets adopted by the state personnel board and approved by the state budget committee. In effect, the court approved delegation of budget-making decisions to these nonlegislative bodies and noted its authority to compel the councils to adopt and fund those decisions. This may be of some significance if the county councils fail to appropriate funds for collective bargaining agreements negotiated between public employees and public employers. If the legislature clearly directs the councils to appropriate such funds, the decision indicates that the courts could compel the appropriation. Complications could arise if such appropriations would exceed other statutory limitations on funding sources (such as the current property tax freeze) or if they would require the councils to increase tax rates even within limits open to them. This decision is far too indirectly pointed to these issues to be relied on in resolving the complicated problems in this area, but it does illustrate an introductory step in a process that will clearly involve more litigation in the future.

In two other cases, the courts established a marked distinction between the availability of injunctive relief to halt strike conduct in the public, as opposed to the private, sector.

The private sector case was *Machinists Local 1227 v. McGill Manufacturing Co.*,<sup>10</sup> in which McGill sought to enjoin alleged mass picketing and use of force and intimidation to block the plant's main gate. The trial court had granted an *ex parte* temporary restraining order and, in a hearing which followed, rejected a union motion to dismiss for want of subject matter jurisdiction and entered a "temporary injunction."

The union appealed this interlocutory order. The court noted application of the Indiana Anti-Injunction Act<sup>11</sup> to this proceeding and held that under section 7 of that Act a plaintiff must invoke the court's jurisdiction "by a verified complaint which alleges all of the factual assertions enumerated by the statute."<sup>12</sup> The court also held:

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<sup>10</sup>328 N.E.2d 761 (Ind. Ct. App. 1975).

<sup>11</sup>IND. CODE §§ 22-6-1-1 to -12 (Burns 1974).

<sup>12</sup>328 N.E.2d at 765. The pertinent language in section 7 provides:

No court of the state of Indiana shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect;

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued



[T]he trial judge is mandated to require the party seeking an injunction to adduce testimony in open court, in support of each material allegation in his complaint. The trial court must also enter specific findings of fact which clearly disclose the existence of each of the factual elements enumerated in section 7. In addition, section 9 of the Act requires the trial court to enter its written findings into the record of the proceedings prior to the issuance of any injunctive order.<sup>13</sup>

The court concluded that, because McGill's complaint failed to allege that the police were unable or unwilling to protect its property, the trial court lacked jurisdiction from the outset to grant injunctive relief. Alternatively, the court held that the trial court's failure to enter an affirmative finding on this issue prior to issuance of the temporary restraining order constituted an additional jurisdictional defect.

The court's conclusion that the trial court erred in not entering specific findings of fact on the issues required under section 7 of the Act prior to issuance of the temporary restraining order seems sound and well supported by prior Indiana authority.<sup>14</sup> However, its alternative pleading requirement, set forth as an

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unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted [more] injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief; and

(d) That complainant has no adequate remedy at law;

(e) That the public officer charged with the duty to protect complainant's property are [is] unable or unwilling to furnish adequate protection.

IND. CODE § 22-6-1-6 (Burns 1974).

<sup>13</sup>328 N.E.2d at 765-66. Section 9 of the Act provides in part:

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of finding of facts made and filed by the court in the records of the case prior to the issuance of such restraining order or injunction . . . .

IND. CODE § 22-6-1-8 (Burns 1974).

<sup>14</sup>The court properly cited the prior cases of *Peters v. Poor Sisters of Saint Francis Seraph of the Perpetual Adoration, Inc.*, 148 Ind. App. 453, 267 N.E.2d 558 (1971) and *Teamsters Local 297 v. Air-Flow Sheet Metal, Inc.*, 143 Ind. App. 322, 240 N.E.2d 830 (1968), in support of this conclusion.



independent ground for holding that the trial court lacked jurisdiction, could present an unreasonable precedent. The court concluded that "[t]he particularized pleading requirements of special statutory proceedings constitute a recognized exception to the liberal 'notice pleading' standard of Indiana Rule of Procedure, Trial Rule 8(A)."<sup>15</sup> Such an exception, if the court means that it would not readily allow amendments to correct erroneous pleadings, could needlessly reestablish procedural pitfalls which were believed eliminated by adoption of the new Indiana Rules of Civil Procedure. Moreover, the authority cited by the court in support of this exception is far from convincing.

The initial case the court cites is *State ex rel. Taylor v. Circuit Court*.<sup>16</sup> In *Taylor*, the supreme court mandated the Marion County Circuit Court to vacate a temporary restraining order afforded a plaintiff, enjoining a union from organizational picketing. Although the plaintiff had attempted to plead around the Indiana Anti-Injunction Act<sup>17</sup> by ignoring the fact that a labor dispute existed, the court concluded that the Act was applicable. The court noted that jurisdiction is acquired under the Act if there is a verified allegation in the complaint that substantial and irreparable injury to complainant's property will be unavoidable unless a temporary restraining order is issued and concluded that the complaint in the case at hand was sufficient to invoke the provisions of the Act. The court issued the mandate to vacate the temporary restraining order, not because the complaint was inadequate, but because the record failed to disclose that testimony was heard as required by the Act.<sup>18</sup> The Act requires that before such an order can issue the court must hear sworn testimony which would be sufficient, if sustained, to justify issuance of a temporary injunction at a hearing held after proper notice. Viewed in this perspective, *Taylor* is support for liberalized pleading, rather than for rigid pleading rules, if evidence in the record supports a finding that the requirements of the Act have been followed.

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<sup>15</sup>328 N.E.2d at 765.

<sup>16</sup>240 Ind. 94, 162 N.E.2d 90 (1959).

<sup>17</sup>IND. CODE §§ 22-6-1-1 to -12 (Burns 1974).

<sup>18</sup>IND. CODE § 22-6-1-6(e) (Burns 1974) provides:

[I]f a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five [5] days and shall become void at the expiration of said five [5] days.

The court also cited *Bartenders Local 103 v. Clark Restaurants*<sup>19</sup> and referred to *Squarcy v. Van Horne*.<sup>20</sup> *Clark Restaurants* is a 1951 case which substantially predates the new Indiana Rules of Civil Procedure and therefore cannot be viewed as authority to support the court's contention that the Anti-Injunction Act provides an exception to those rules. Moreover, the court in *Clark Restaurants* found that the complaint, which did not use the specific statutory language alleging "a substantial and irreparable injury to the plaintiff," was in substantial compliance in that it alleged that the act complained of "is now causing substantial and irreparable injury to the plaintiff and plaintiff's business."<sup>21</sup> Patently, *Clark Restaurants* is authority permitting inexact pleading to establish the court's jurisdiction. Finally, *Squarcy* does not even relate to a labor dispute. Rather, it involves a will contest and has no apparent relevance to the question of whether this Anti-Injunction Act constitutes an exception to the liberalized pleading authorized by the Indiana Rules of Civil Procedure.

Interestingly, in another case cited by the court for another point, *Weist v. Dirks*,<sup>22</sup> the Indiana Supreme Court noted that "in appeals of this character [appeal from an interlocutory judgment enjoining appellants from picketing the retail grocery and food store of the appellee] the court is not concerned with the pleadings and will consider only the evidence which tends to support the judgment."<sup>23</sup> *Weist* also substantially predates the current Indiana Rules; thus the supreme court stated even prior to those rules that it would not concern itself with reviewing the pleadings.

Whether or not *Weist* is regarded as substantial authority to support this point, absent the most compelling authority to the contrary it is undesirable for the courts to resurrect pleading problems believed disposed of by the Indiana Rules of Civil Procedure in order to deny jurisdiction.

The public sector injunction case is *Elder v. City of Jeffersonville*,<sup>24</sup> presenting a startling contrast to *McGill*. In *Elder*, Jeffersonville firemen sought review of a trial court's permanent injunction prohibiting them from striking. The firemen argued (1) that the strike—if there was a strike—was over before the permanent injunction issued and (2) that the lower court erred in

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<sup>19</sup>122 Ind. App. 165, 102 N.E.2d 220 (1951).

<sup>20</sup>321 N.E.2d 858 (Ind. Ct. App. 1975).

<sup>21</sup>122 Ind. App. at 169, 102 N.E.2d at 222.

<sup>22</sup>215 Ind. 568, 20 N.E.2d 969 (1939).

<sup>23</sup>*Id.* at 569, 20 N.E.2d at 969.

<sup>24</sup>329 N.E.2d 654 (Ind. Ct. App. 1975).

not considering evidence that the city had failed to negotiate in good faith. The court found some evidence that a strike was in progress and might continue and that even if the strike had subsided when the permanent injunction issued, no evidence was offered that the disputes which prompted the initial strike had been resolved. This latter observation was held sufficient to support the lower court's issuance of a permanent injunction. Regarding the second issue, the court cited *Anderson Federation of Teachers v. School City*<sup>25</sup> and noted that: "[T]he course of labor negotiations before or after the alleged strike would be of little significance. The question to be decided is whether (1) public employees are involved, and (2) whether there is in fact a strike or 'job action.'"<sup>26</sup> The court finally noted that no exception is granted under *Anderson Teachers* because the public employer has failed or refused to negotiate.

The contrast with *McGill* is marked. In the private sector, *McGill* establishes that in order to obtain an injunction under the Anti-Injunction Act the plaintiff must conform his pleadings exactly to the requirements of the Act. The trial court must make each of the fact findings required under the Act *before* issuing any relief, or the court order will be found to be void *ab initio*. Under *Elder*, if public employees are involved, any strike can be enjoined—regardless of the "clean hands" of the plaintiff. Rejection of the "clean hands" defense is based on the court's observation that no exception was made by the Indiana Supreme Court in *Anderson Teachers* based on conduct of the plaintiff during negotiations. This reliance is unwarranted, as there is no indication in either of the *Anderson* opinions that the supreme court confronted the question of whether the "clean hands" doctrine could be considered as a possible defense to the equitable injunctive remedy. In *Anderson Teachers* the court decided only that a strike by public employees is illegal under Indiana common law and that the Anti-Injunction Act does not apply to public employee conduct. The court did not specifically address the question of whether the trial court retains discretion in the case of a public employee strike to consider the impact of the strike on the public, the manner in which the strike is conducted, or the provocation for the strike, in determining whether to grant the requested injunctive relief.

The final significant case during the survey period involving

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<sup>25</sup>252 Ind. 558, 251 N.E.2d 15 (1969), *rehearing denied*, 252 Ind. 581, 254 N.E.2d 329 (1970).

<sup>26</sup>329 N.E.2d at 660.

public sector labor relations was *Gary Teachers Union v. School City*.<sup>27</sup> In the *Gary Teachers* case, the court concluded that a collective bargaining provision which purported to apply Tenure Act restrictions to teachers who have completed only three years of service with a school and have entered into a contract for a fourth year was void as contrary to law. The Tenure Act provides tenure for teachers who have completed five years of teaching with one employer and have entered into a contract for a sixth year.<sup>28</sup> The court, in a split opinion, held that the purpose of the Tenure Act was to establish a uniform tenure system for all schools and to protect the educational interest of the state which "demands some reasonable period of time within which a school system may seek to improve the quality of its teachers even though those replaced may meet minimal standards of competence and behavior."<sup>29</sup> The court concluded that the Tenure Act prohibits awarding tenure status to teachers before the statutory standards are met. The General School Powers Act of 1965<sup>30</sup> was found not to alter the impact of the Tenure Act, since it refers only to general powers of a school corporation to employ, contract for and discharge teachers, and is specifically qualified by subsection 7, which provides that "compensation, terms of employment and discharge of teachers shall, however, be subject to and governed by the laws relating to employment, contracting, compensation and discharge of teachers."<sup>31</sup> The court also noted that the Teacher Bargaining Act<sup>32</sup> was not applicable because it excludes employment and discharge from subjects of bargaining.

In a strong dissenting opinion, Judge Staton observed that "the Teacher Tenure Act does not state a legislative intent to establish a uniform minimum trial period of employment . . . and should not be interpreted to bar a school corporation from contractually establishing more advantageous tenure arrangements which tend to further the Act's fundamental 'job security' purpose."<sup>33</sup> He further noted the broad power conferred upon public school authorities by the School Powers Act, and took issue with the court's conclusion that subsection 7 negates the power of school authorities to negotiate terms of employment for teachers which are more advantageous than those provided by statute. In support of this

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<sup>27</sup>332 N.E.2d 256 (Ind. Ct. App. 1975).

<sup>28</sup>IND. CODE §§ 20-6-12-1 to -6 (Burns 1975).

<sup>29</sup>332 N.E.2d at 259.

<sup>30</sup>IND. CODE §§ 20-5-2-1 to -3 (Burns 1975).

<sup>31</sup>*Id.* § 20-5-2-2(7).

<sup>32</sup>*Id.* §§ 20-7.5-1-1 to -14.

<sup>33</sup>332 N.E.2d at 264.

contention, he cited *Weist v. Board of School Commissioners*.<sup>34</sup> Judge Staton's reliance on *Weist*, though ignored by the majority, appears sound. In *Weist*, the issue before the court was whether a collective bargaining agreement could modify statutory provisions for teachers' sick leave. The court held that the agreement could not operate in derogation of laws governing compensation for teachers, but concluded that the contractual provision in question expanded, rather than limited, sick leave available to teachers and thus was not contrary to laws governing compensation of teachers within the meaning of the School Powers Act.

If the *Gary Teachers* case is construed to prohibit contractual agreements for benefits greater than those required by statute, this approach could significantly limit subjects of collective bargaining. It need not be so construed, however, since the court's conclusion that earlier tenure could not be contractually provided was based upon its interpretation of the intent of the Tenure Act. Even if the court is correct in its conclusion that one purpose of the Tenure Act is to require a specified time for a school system to seek improvement in the quality of its teachers, other statutory benefits for teachers could be construed, as in *Weist*, to establish only minimum levels of benefits. In addition, the Teacher Bargaining Act requires that statutory benefits which are subjects of bargaining under the Act must be construed as minimums, subject to bargaining for greater benefits. Any other construction would defeat the requirement to bargain on such subjects.

### **XIII. Products Liability**

*John F. Vargo\**

#### *A. Introduction*

During the past year the Indiana decisions in the area of products liability have been few in number, but the issues in the cases have been extremely interesting and conceptually stimulating. In general, the recent cases have considered enterprise liability and the patent danger rule.

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<sup>34</sup>320 N.E.2d 748 (Ind. Ct. App. 1974).

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The necessary brevity of a survey article makes it impossible to fully examine these issues. Thus, any shortcomings or misconceptions in the following discussion of enterprise liability may be attributed to space limitations which have precluded the author from fully defining terms and phrases used as words of art. My apologies to legal theorists, economists, and the bench and bar for some of the terms and expressions which therefore may be unintelligible to any one, or possibly all, of these groups.

Two recent Indiana cases, *Chrysler Corp. v. Alumbaugh*<sup>1</sup> and *City of Indianapolis v. Bates*,<sup>2</sup> discussed separate issues concerning the theoretical parameters of strict liability in tort—a subject often confused in Indiana law. In *Alumbaugh* a vehicle manufactured by the defendant struck another vehicle which ricocheted into the plaintiff's automobile. The injured plaintiff sued in strict liability in tort, alleging that his loss was precipitated by a defect in the defendant-manufacturer's vehicle. The defendant contended that the plaintiff was a "bystander" or "non-user" of the product and, as such, should be denied recovery since strict liability in tort pursuant to section 402A of the Restatement<sup>3</sup> applies only to "users of the product."<sup>4</sup>

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<sup>1</sup>342 N.E.2d 908 (Ind. Ct. App. 1976). For procedural issues decided in this case, see Harvey, *Civil Procedure*, *supra* at 97, 113.

<sup>2</sup>343 N.E.2d 819 (Ind. Ct. App. 1976).

<sup>3</sup>RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as § 402A]. This section states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

<sup>4</sup>Section 402A, by its literal wording, would appear to apply only to "users" or "consumers." The drafters of the restatement refused to take a position on whether a "bystander" (non-user) could recover. See § 402A, comment o. However, it would appear that courts are generally allowing the bystander to recover. See *Caruth v. Mariani*, 11 Ariz. App. 188, 463 P.2d 83 (1970); *Elmore v. American Motors Corp.*, 70 Cal. 2d 578, 451 P.2d 84, 75

The Third District Court of Appeals found for the bystander-plaintiff, citing *Sills v. Massey-Ferguson, Inc.*,<sup>5</sup> which advanced two alternative rationales for bystander recovery: the bystander is a foreseeable party, or foreseeability is irrelevant to a bystander's recovery. Under the first theory, the manufacturer owes the bystander a duty since he is a foreseeable party. The second approach allows the bystander to recover without being a foreseeable party since foreseeability is a negligence concept, and negligence is irrelevant in strict liability actions. Proponents of this second approach base recovery on such policy considerations as the "risk bearing" capacity of the parties. Although the *Sills* court did not choose between the two theories, the *Alumbaugh* court stated:

We believe foreseeability has a deeper significance and is inherent in a system of civil liability *utilizing fault as a cornerstone*. While § 402A eliminates consideration of the care exercised by the manufacturer or supplier in fixing liability, it does not reject the concept of fault. Instead it moves yet one plane further from intentional harms by imposing an affirmative duty to avoid supplying products in a defective condition and which are unreasonably dangerous. Application of § 402A to bystanders should be limited to those whom the manufacturer or supplier should reasonably foresee as being subject to the harm caused by the defect.<sup>6</sup>

Thus, it would appear that the *Alumbaugh* court injected fault or negligence standards into section 402A.

Another case which chose negligence standards and rejected the possibility of a non-negligence or no-fault concept was *City of Indianapolis v. Bates*.<sup>7</sup> In *Bates* a defective automatic traffic signal showed a green light to all motorists, causing the plaintiff's auto and another vehicle to collide in the intersection. The city's

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Cal. Rptr. 652 (1969); *Mitchell v. Miller*, 26 Conn. Supp. 142, 214 A.2d 694 (New Haven Super. Ct. 1965); *Piercefield v. Remington Arms Co.*, 375 Mich. 85, 133 N.W.2d 129 (1965); *Darryl v. Ford Motor Co.*, 440 S.W.2d 630 (Tex. 1969); see also *Ciampichini v. Ring Bros., Inc.*, 40 App. Div. 2d 289, 339 N.Y.S.2d 716 (1973); Note, *Strict Products Liability to the Bystander: A Study in Common Law Determinism*, 38 U. CHI. L. REV. 625 (1971); Note *Products Liability in Indiana: Can The Bystander Recover*, 7 IND. L. REV. 403 (1973); Note, *Products Liability—Bystander Recovery in Strict Liability*, 41 TENN. L. REV. 756 (1974).

<sup>5</sup>296 F. Supp. 776 (N.D. Ind. 1969).

<sup>6</sup>342 N.E.2d 908, 917 (emphasis added).

<sup>7</sup>343 N.E.2d 819 (Ind. Ct. App. 1976).

defense to the injured plaintiff's strict liability suit<sup>8</sup> was the contention that only negligence principles should be applied. Reversing a jury verdict for the plaintiff, the court of appeals found strict liability to be inapplicable to a city, giving no reason for this decision other than to cite prior authority which had not even discussed the issue.<sup>9</sup> However, one concurring judge stated that the rationales of strict liability seemed to be applicable but were outweighed by countervailing policy considerations.<sup>10</sup>

Thus, both *Alumbaugh* and *Bates* raised issues concerning

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<sup>8</sup>The *Bates* court noted that both parties couched their arguments in generalities, speaking in terms of strict liability as applied to animals, products, and ultrahazardous activities. *Id.* at 821 n.1. This "generalization" is understandable since it is the *rationale* underpinning various theories of strict liability in tort which is being used to extend no-fault to new areas. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 154 (1976) [hereinafter cited as Klemme]. Any attempt to "pigeonhole" strict liability into a particular area might preclude its application in other areas. For example, the literal use of § 402A for actions involving the use of land might preclude recovery because land is generally not considered a product. However, this restrictive approach should not bar litigants from attempting to show that the reasoning of strict liability should apply to their particular cases or circumstances. As one court has stated:

The law of products' liability has become a field of strict liability, and there is continual movement away from *fault* as the governing principle for allocation of losses, in favor of enterprise liability or the distribution of losses over a larger segment of society through insurance. There is no sound reason to immunize landowners from the community's perception of values.

*Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 101 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973), *noted in* Klemme, *supra* note 8, at 154 n.9.

<sup>9</sup>The *Bates* court stated that all available Indiana authority supports the conclusion that the city is liable, if at all, upon a negligence theory. 343 N.E.2d at 821. However, the citations given in support of this conclusion *do not* discuss strict liability as being inapplicable to cities. *See Campbell v. State*, 259 Ind. 55, 284 N.E.2d 733 (1972); *City of South Bend v. Turner*, 156 Ind. 418, 60 N.E. 271 (1901); *City of Madison v. Baker*, 103 Ind. 41, 2 N.E. 236 (1885); *Turner v. City of Indianapolis*, 96 Ind. 51 (1884); *Board of Comm'rs v. Briggs*, 337 N.E.2d 852 (Ind. Ct. App. 1975); *Klepinger v. Board of Comm'rs*, 143 Ind. App. 155, 239 N.E.2d 160 (1968); *Gilson v. City of Anderson*, 141 Ind. App. 180, 226 N.E.2d 921 (1967); *City of Evansville v. Beheme*, 49 Ind. App. 448, 97 N.E. 565 (1912). *See also* *Miller v. Griesel*, 308 N.E.2d 701 (Ind. 1974); *Annot.*, 34 A.L.R.3d 1008 (1970).

Obviously, the application of strict liability against cities was a case of first impression in Indiana. It would seem reasonable to have embarked upon an analysis of why strict liability is inapplicable to cities or, at least, to have referred to other jurisdictions discussing the problem.

<sup>10</sup>343 N.E.2d at 822 (Sullivan, J., concurring). However, Judge Sullivan neither explained what constituted the "countervailing policy considerations" nor related his rationale for determining that these considerations outweighed the application of strict liability in tort.



strict liability: *Alumbaugh* deals with the issue of whether strict liability contains negligence standards, and *Bates* finds that the strict liability rationales were apparently present but simply over-balanced. Both also raised the question of what is strict liability?

### B. *Strict Liability In Tort*

Strict liability is a theory of recovery intended to replace the concept of negligence in certain situations;<sup>11</sup> it is "strict" in the sense that proof of negligence or fault is not required for recovery.<sup>12</sup> Although strict liability was not conceived as a type of general insurance wherein the party deemed liable would be forced to pay in all circumstances, it has not been specifically determined where strict liability in tort should cease.<sup>13</sup>

The extent of the attendant liability is determined by the theory upon which strict liability is founded. Several different concepts, including "risk spreading," "deep pocket," "cheapest insurer" and "cheapest cost avoider,"<sup>14</sup> are mentioned as the underlying basis for strict liability, but none of these theories, either alone or in combination, are sufficiently explanatory. However, recent articles have developed a comprehensive theory which seems to explain both the reasons for and the extent of strict liability in tort.<sup>15</sup> This theory is called "enterprise liability."

### C. *Enterprise Liability*

Enterprise liability is the concept that losses to society caused by an enterprise activity should be borne by that enterprise. Recognizing that the total resources available to the community are limited, enterprise liability acknowledges that the competitive market system, operating on the law of supply and demand, is the

<sup>11</sup>See generally Calabresi & Hirschoff, *Toward A Test For Strict Liability in Torts*, 81 YALE L.J. 1055 (1972); Klemme, *supra* note 8.

<sup>12</sup>*Id.*

<sup>13</sup>Calabresi & Hirschoff, *supra* note 11, at 1056.

<sup>14</sup>Klemme, *supra* note 8, at 156.

<sup>15</sup>Many authors have expressed their viewpoints on various theories of strict liability or enterprise liability. See, e.g., A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). However, Professor Guido Calabresi's theory seems to have gathered more support than most, and a fairly comprehensive tracing of his theory can be found in the following: G. CALABRESI, *COSTS OF ACCIDENTS, A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter cited as *COSTS*]; Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961) [hereinafter cited as *Risk Distribution*]; Calabresi & Hirschoff, *supra* note 11. Professor Howard Klemme takes a slightly different approach in Klemme, *supra* note 8.

best way for the community to distribute resources in order to most efficiently satisfy the greatest number of community members.<sup>16</sup> The theory of enterprise liability also advances the concept that the legal decision to leave the loss on one party or to shift it to another will determine the distribution of the loss among the segments of society which will eventually bear it.<sup>17</sup>

One author has described enterprise liability as follows:

The theory of strict or absolute tort liability is not, I would suggest, a theory at all. It does not provide any general unifying criteria or rationale which can be used to account for why the tort law has developed any of its various rules of liability and nonliability. Strict liability does nothing more than describe a result in certain limited cases. Under strict liability, the defendant is a tortfeasor simply because he engaged in a particular type of activity for which the law imposes liability without regard to fault. Basically, strict liability simply means that among the several reasons why we may wish to treat the defendant as a tortfeasor and, as a consequence, treat the plaintiff's loss as a cost of the defendant's enterprise, none of those reasons is because we consider his acts socially undesirable. At most, strict liability is but another way of generally stating the theory of enterprise liability, that is, losses created by an enterprise ought to be borne by that enterprise. Like the enterprise liability theory, strict liability does require the enterprise be one of the "but for" causes, but also like the general statement of the enterprise liability theory, strict liability does not provide us any cost accounting criteria which can be used generally. Neither does the theory offer any common rationale to explain why strict liability makes sense in terms of one or more identifiable social objectives. Again, in essence, all strict liability says is, the defendant is liable, notwithstanding the fact that his conduct was not "bad."<sup>18</sup>

This definition does not explain the circumstances under which a person should be held liable, nor does it demonstrate the reasons for placing liability upon an enterprise for the losses it has created. Two closely related approaches do, however, explain these aspects of enterprise liability.

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<sup>16</sup>Klemme, *supra* note 8, at 158-59; *Risk Distribution*, *supra* note 15, at 500-07.

<sup>17</sup>Klemme, *supra* note 8, at 161.

<sup>18</sup>*Id.* at 174.

### 1. *First Approach*<sup>19</sup>

Fault or negligence is derived from the idea that an actor should be liable for his faulty conduct.<sup>20</sup> Such conduct is defined by social standards found in the "reasonable man" test which premises liability on the duty of a person to prevent exposing others to unreasonable risks.<sup>21</sup> The duties of the reasonable man are encompassed in a "cost-benefit" analysis which contains three variables: (1) The probabilities an accident will occur; (2) the gravity of harm if an accident does occur; and (3) the burden of precaution adequate to avoid the accident.<sup>22</sup> Thus, fault principles limit liability to accidents worth avoiding; all other accidents are borne by the injured parties.

Although fault principles were thus designed to deter faulty behavior, this deterrent effect is highly questionable.<sup>23</sup> For example, the cost-benefit test requires near-perfect foreseeability while being inefficient in avoiding the costs of accidents.<sup>24</sup> In addition, fault concepts fail to consider the fairness of imposing the *ultimate* burden of tort losses on one segment of the public as opposed to another.<sup>25</sup> Fault concepts merely consider the loss as a burden on the immediate parties, disregarding the "externalization"<sup>26</sup> of tort losses by the parties initially bearing the loss.

Strict liability surmounts these problems inherent in fault concepts by imposing liability on the party in the best position to make the cost-benefit analysis, while not requiring its actual determination.<sup>27</sup> In other words, instead of forcing the actor to actually foresee and quantitatively determine the probability and

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<sup>19</sup>The "first approach" in this article is derived from Calabresi's viewpoint of strict liability in tort, especially as defined in his article with Hirschoff. See generally Calabresi & Hirschoff, *supra* note 11.

<sup>20</sup>Calabresi refers to negligence and fault as interchangeable entities. However, he obviously is speaking not about individual moral fault but about the external moral fault concepts contained in the standards of negligence. See *id.* at 1055-59.

<sup>21</sup>*Id.*

<sup>22</sup>The "cost-benefit" analysis of Calabresi is based upon the "Learned Hand test," sometimes referred to as the "risk-utility" test. See *id.* at 1056-57 n.7, citing *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947); *Conway v. O'Brien*, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941).

<sup>23</sup>COSTS, *supra* note 15, at 135-40; Calabresi & Hirschoff, *supra* note 11, at 1058-59; Klemme, *supra* note 8, at 172-73.

<sup>24</sup>Calabresi & Hirschoff, *supra* note 11, at 1058-59.

<sup>25</sup>See *id.* at 1070; Klemme, *supra* note 8, at 177; see generally COSTS, *supra* note 15, ch. 5, 7, 10.

<sup>26</sup>See COSTS, *supra* note 15, at 144-50, 244-50 (explanation of "externalization").

<sup>27</sup>Calabresi & Hirschoff, *supra* note 11, at 1060-61.

gravity of harm as balanced against the burden of precautions, strict liability requires only a decision regarding which party is in the best position to make the cost-benefit analysis and to act on such decision. "The issue becomes not whether avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worth it."<sup>28</sup>

Determining which party can best make the cost-benefit analysis requires investigating each party's knowledge, understanding, and appreciation of the risks, as well as weighing the choices or alternatives available to the various parties. These requirements for the application of strict liability greatly resemble the defense of assumption of risk in its purest form.<sup>29</sup> In fact,

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<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 1064-65. As Calabresi points out, courts have grossly misapplied the doctrine of assumption of risk while proper application of it is *essential* to the understanding of a non-fault world (strict liability in tort). *Id.* at 1065.

Proper application of assumption of risk requires the plaintiff to have *actual* knowledge, understanding, and appreciation of the risk he is consenting to undertake. RESTATEMENT (SECOND) OF TORTS § 496D (1965). In addition, if the plaintiff is not allowed adequate alternatives, he will not be considered to have voluntarily consented to the risk. RESTATEMENT (SECOND) OF TORTS § 496E (1965). Of course, the plaintiff's consent is based upon a subjective standard, not upon the objective reasonable man standard found in negligence or contributory negligence. RESTATEMENT (SECOND) OF TORTS § 496A, comment d. An excellent example of the proper application of assumption of risk in a strict liability action is *Borel v. Fibreboard Paper Products, Inc.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), wherein Judge Wisdom stated:

Another form of contributory negligence consists of voluntary and unreasonable conduct in encountering a known risk. As found in comment *n* to section 402(A) of the Restatement, it represents a hybridization of *volenti* and traditional contributory negligence. Applying a subjective standard, the jury must find the first three elements of *volenti*: the plaintiff must have had *actual* knowledge, understanding, and appreciation of the danger. With respect to voluntariness, however, the jury must find that the plaintiff's action was both voluntary from a subjective standpoint and unreasonable from an objective standpoint.

493 F.2d at 1096-97. Judge Wisdom was concerned with the "overlap" area of contributory negligence and assumption of risk. See RESTATEMENT (SECOND) OF TORTS § 496A, comment d. However, he correctly pointed out the general requirements of assumption of risk.

Another case which used assumption of risk in a proper manner was *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) wherein the court stated:

A plaintiff cannot be precluded from recovery in a strict liability case because of his own negligence. He is precluded from recovery only if he knows of the specific defect eventually causing his injury and voluntarily proceeds to use the product with knowledge of the danger caused by the defect. Furthermore, a finding of assumption of risk must be based on the individual's own subjective knowledge,

assumption of risk is merely the imposition of strict liability on the plaintiff—the opposite side of the coin from strict liability for the defendant.<sup>30</sup>

The determination of who is liable under strict liability does not depend upon negligence or contributory negligence but upon which party is in the best position to perform the cost-benefit analysis.<sup>31</sup> Because the immediate parties are merely representatives of various categories of participants within the enterprise, the inquiry should reflect which category, not which individual, is in the best position to make the cost-benefit analysis. The selection process should consider only the *categories* which actually bear the losses, not the individuals who bear the losses initially.<sup>32</sup>

## 2. Second Approach<sup>33</sup>

The second approach is a variation of the first. It takes into account the cost accounting function of tort law loss distribution<sup>34</sup> to achieve four interrelated purposes: (1) Preventing as many tort-like losses as economically feasible; (2) distributing the costs of such prevention, or, alternatively, the cost of insuring against the tort-like losses which will occur; (3) encouraging individual members of the community to make rational decisions about the use of their personally available resources; and (4) avoiding the creation of price and allocation distortions in the use of the marketplace as a tool for “best” allocating the community’s total limited resources.<sup>35</sup>

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not upon the objective knowledge of a “reasonable man.” Such a defense can be charged upon by the court only if there is evidence introduced by defendant that the decedent knew of the specific defect causing his death and appreciated the danger it involved before using the aircraft.

*Id.* at 901-02 (citations omitted).

Indiana law has failed to recognize the proper application of assumption of risk, making Indiana one of the jurisdictions which “grossly misapplies” the doctrine. See Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270, 279 n.48 (1975) [hereinafter cited as Vargo, 1975 Survey].

<sup>30</sup>Calabresi & Hirschhoff, *supra* note 15, at 1065.

<sup>31</sup>*Id.*

<sup>32</sup>See authorities cited note 25 *supra*.

<sup>33</sup>The “second approach” is derived from Professor Howard Klemme. See generally Klemme, *supra* note 8. Klemme characterizes his theory as descriptive, reflecting what the courts and legislatures have in fact been doing, and Calabresi’s theory as prescriptive, reflecting what the courts and legislatures should be doing. *Id.* at 156. However, Klemme acknowledges that his theory is primarily derived from Calabresi’s. *Id.* at 156-57.

<sup>34</sup>*Id.* at 162.

<sup>35</sup>*Id.* at 177-78. The function of price is to reflect the relative cost of production of goods. If all costs of a given enterprise are not reflected in

Three criteria are used for achieving these purposes. They are based on the philosophy that people should be able to rely on their expectations that all activities or enterprises will be executed to prevent tort-like losses disrupting the status quo. The first criterion determines which enterprise failed to meet the community's normal expectations.<sup>36</sup> The enterprise failing to function as normally expected will bear the *ultimate* burden of the tort loss. It is usually, if not always, the enterprise which could have taken the most effective preventive action, if any such action could have been taken at all.<sup>37</sup>

The second and third criteria determine which category of participants within the enterprise is the superior risk-bearing category by deciding who can best (1) cause more preventive action to avoid similar losses in the future and (2) cause the alternative costs of prevention or insurance to be passed on most efficiently to the purchasing consumers.<sup>38</sup> Generally, the superior risk bearer will meet both criteria.

Enterprise liability has two rationales. First, the theory seeks to encourage the efficient use of existing resources without distorting the market place. For a person to plan the efficient utilization of his own limited resources, he must be able to rely on the activities of others being carried on in their normally expected manner. Otherwise, he would be less inclined to invest his resources, or, alternatively, he would invest a greater amount of his resources to hedge against the possibility of loss he might incur if a causally related enterprise failed to meet normal expectations.<sup>39</sup>

The second rationale of enterprise liability is an attempt to protect the pricing mechanism of the marketplace as a tool for "best" allocating the community's total limited resources. When a consumer buys a product which fails to meet normal expectations or which is diminished in value because another causally related enterprise has failed to meet expectations, the consumer has paid more for the product than he otherwise would have, and, therefore the market price has been distorted. If the costs of any physical losses caused by such failures are left on the purchaser, the demand created for such goods will have been greater than it otherwise would have been. Consequently, more of the community's limited

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the price of its goods, price is distorted. Therefore, the market place fails to accurately perform its function of allocating community resources. *COSTS*, *supra* note 15, at 70 & n.2; Klemme, *supra* note 8, at 188.

<sup>36</sup>Klemme, *supra* note 8, at 180-82.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.* at 183-84.

<sup>39</sup>*Id.* at 184.

resources will have been allocated to the production of such goods or services than the marketplace ideally would have allocated.<sup>40</sup>

Thus, there are at least two somewhat different approaches to the theory of enterprise liability. However different these two approaches may seem, both reject fault concepts as a basis for recovery in strict liability. Under neither approach does strict liability depend upon "duties"<sup>41</sup> and "foreseeability"<sup>42</sup> as expressed

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<sup>40</sup>*Id.* at 184-86.

<sup>41</sup>Duty is a negligence or fault concept and nothing else, as one court has stated:

The crucial difference between strict liability and negligence is that the existence of due care, whether on the part of seller or consumer, is irrelevant. The seller is responsible for injury caused by his defective product even if he "has exercised all possible care in the preparation and sale of his product." . . . [T]he seller "may not preclude an injured plaintiff's recovery by forcing him to prove negligence in the manufacturing process." What the seller is not permitted to do directly, we will not allow him to do indirectly by injecting negligence concepts into strict liability theory. In attempting to articulate the definition of "defective condition" and to define the issue of proximate cause, the trial court here unnecessarily and improperly injected negligence principles into this strict liability case.

*Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893, 899 (Pa. 1975) (citations omitted).

<sup>42</sup>Foreseeability, an overused concept, is derived from negligence theory and refers to both duty and proximate cause. See *Travis v. Rochester Bridge Co.*, 188 Ind. 79, 122 N.E. 1 (1919) (duty); *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928) (duty); *Elder v. Fisher*, 247 Ind. 598, 217 N.E.2d 847 (1966) (proximate cause). However, the foreseeability concept contained in the duty standard is whether the plaintiff or harm were objectively foreseeable, while foreseeability in the proximate cause context requires an examination *after* a breach of duty has been established and requires an analysis of whether or not the events that took place were "highly extraordinary." RESTATEMENT (SECOND) OF TORTS § 435. See *Galbreath v. Engineering Const. Corp.*, 149 Ind. App. 347, 273 N.E.2d 121 (1971).

Foreseeability of duty is inappropriate in products liability suits because it should not apply to non-fault theories such as § 402A. See, e.g., *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975), wherein the court stated:

The trial court further confused the standards of strict liability in its charge on proximate cause. The court charged that, in order for it to be said that a defect caused plaintiff's injury, "such a consequence, under all the surrounding circumstances of the case, *must have been foreseeable by the seller.*" To require foreseeability is to require the manufacturer to use due care in preparing his product. In strict liability, the manufacturer is liable even if he has exercised all due care. Foreseeability is not a test of proximate cause; it is a test of negligence. Because the seller is liable in strict liability regardless of any negligence, whether he could have foreseen a particular injury is irrelevant in a strict liability case. In either negligence or strict liability, once the negligence or defective product



in *Alumbaugh*; neither approach recognizes fault as a cornerstone of civil liability.<sup>43</sup>

The recognition by several courts in other jurisdictions<sup>44</sup> of the nonapplicability of fault concepts in strict liability actions further underscores the fact that section 402A *does* reject the concept of fault *unless* it is injected by negligence-oriented courts.<sup>45</sup> The *Bates* court, illustrating the approach of a negligence-oriented court, totally failed to analyze the issue of whether strict liability should or should not apply to cities, and merely concluded that strict liability does not apply. Yet, a closer examination of strict liability in tort as a theory has led some jurisdictions to find its applicability to cities quite appropriate.<sup>46</sup>

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is shown, the actor is responsible for all the unforeseen consequences thereof no matter how remote, which follow in a natural sequence of events.

*Id.* at 900 (citations omitted).

<sup>43</sup>The *Alumbaugh* court's approach to strict liability is reminiscent of the nineteenth century view that fault was the unifying theory of tort liability. See O. HOLMES, *THE COMMON LAW* 63-129 (1963).

<sup>44</sup>Several courts have clearly expressed the idea that fault principles do not belong in § 402A actions. For example, in *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975) the court stated that the trial court unnecessarily and improperly injected negligence principles into a strict liability case. *Id.* at 899. *Berkebile* also rejected the term "unreasonably dangerous" as being inapplicable to § 402A actions; the court feared the terminology might suggest the reasonable man concept contained in negligence, further diluting the strict liability concept. *Id.* The *Berkebile* court said that § 402A recognizes liability without fault and that the reasonable man standard in any form has no place in a strict liability case. *Id.* at 899-900. Further, the court rejected the negligence concept of foreseeability as being applicable to § 402A because to require foreseeability is to require the manufacturer to use due care. *Id.* at 900.

Other jurisdictions have also rejected negligence principles in § 402A cases. See *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 132-33, 501 P.2d 1153, 1161, 104 Cal. Rptr. 433, 441 (1972); *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973).

<sup>45</sup>Perhaps the concern of most courts and lawyers over strict liability is their "strong emotional attachment to the fault concept which the traditional study of the law of torts tends to produce. It may likewise stem from lawyers' quests for rationality and the troublesome sense of frustration, if not confusion, lawyers feel when such rationality appears to be lacking." Klemme, *supra* note 8, at 155.

<sup>46</sup>In deciding whether to apply strict liability of the variety found in *Rylands v. Fletcher*, 3 H. & C. 774, 159 Eng. Rep. 737 (1865), *rev'd*, L.R. 1 Ex. 265 (1866), *aff'd*, L.R.3 H.L.330 (1868), the court in *Bridgeman Russell Co. v. City of Duluth*, 158 Minn. 509, 197 N.W. 971 (1924), concluded that the city should be held strictly liable for damages caused by a break in the water line. The court stated:

In such a case, even though negligence be absent, natural justice would seem to demand that the enterprise, or what really is the same thing, the whole community benefited by the enterprise, should stand



### D. Causation

In *Nissen Trampoline Co. v. Terre Haute First National Bank*,<sup>47</sup> the defendant was the manufacturer of the Aqua Diver, a small circular trampoline marketed as a diving apparatus for pools and lakes.

On his first attempted jump off the Aqua Diver platform, the thirteen-year-old plaintiff landed with his right foot on the bed of the trampoline and his left leg entangled in the elastic cables; his left foot either missed or slipped off the bed, causing injuries necessitating the subsequent amputation of the leg above the knee. Evidence at trial showed that the defendant-manufacturers had determined through premarketing testing that it was possible for a user's foot to pass through the elastic cables connecting the bed to the frame. Nevertheless, Nissen marketed the product without an accompanying warning of its dangers.

The defendant received a favorable verdict, but the trial court found it to be against the weight of the evidence and ordered a new trial.<sup>48</sup> The First District Court of Appeals affirmed, citing the defendant's failure to warn of the Aqua Diver's dangers and stating that under section 402A a product may be defective when the seller fails to warn or instruct regarding potential dangers in the use of the product.<sup>49</sup> In response to defendant's contention that instructions for using the Aqua Diver were unnecessary, the *Nissen* court distinguished between instructions and warnings<sup>50</sup> and sustained the plaintiff's action on the basis of the defendant's failure to warn, independent of any necessity for instructions.

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the loss rather than the individual. It is too heavy a burden upon one. The trend of modern legislation is to relieve the individual from the mischance of business or industry without regard to its being cause by negligence.

*Id.* at 509, 197 N.W. at 972. *Accord*, *Lubin v. Iowa City*, 257 Iowa 383, 131 N.E.2d 765 (1964); *Moody v. City of Galveston*, 524 S.W.2d 583 (Tex. Civ. App. 1975).

<sup>47</sup>332 N.E.2d 820 (Ind. Ct. App. 1975), *rev'd on procedural grounds*, 55 Ind. Dec. 141 (Ind. 1976).

<sup>48</sup>The supreme court reversed because the trial judge had not abided by the provisions of Trial Rule 59(E)(7), governing granting of new trials when a jury verdict is against the weight of the evidence. 55 Ind. Dec. at 146-47. The court of appeals' substantive discussion is, of course, still valuable.

<sup>49</sup>Failure to warn of dangers appears to be one of the three ways in which a product may be considered defective in § 402A. See *Campbell & Vargo, The Flammable Fabrics Act and Strict Liability*, 9 IND. L. REV. 395, 409 (1976) [hereinafter cited as *Flammable Fabrics Act*].

<sup>50</sup>The distinction between warnings and instructions seems to be that a failure to heed clear instructions concerning the use of a product is a misuse, while a failure to heed clear warnings of danger concerning the product itself is assumption of risk. Noel, *Products Defective Because of Inadequate*

The court of appeals noted that strict liability failure-to-warn cases create a curious problem regarding the element of causation since the warning defect is separable from the product itself. Generally, the plaintiff has the burden of proving the causal connection between the defective product and his injuries by establishing that "but for"<sup>51</sup> the lack of defendant's warning the plaintiff would not have been injured. This requirement would be impossible to meet in failure-to-warn cases since it would force the plaintiff to show he would have heeded a sufficient warning if one had been given. The *Nissen* court responded to this causation problem by creating a rebuttable presumption that the plaintiff would have heeded a sufficient warning.

The *Nissen* court's presumption in effect eliminates one of the most basic precepts in all of tort law: the "but for" rule. However, a long-standing exception to the application of the "but for" rule is the situation in which the plaintiff is prevented from proving his case because of some conduct by the defendant.<sup>52</sup> *Nissen* fits this exception since the defendant's conduct, the failure to warn, was the reason for the plaintiff's inability to prove causation. In addition, *Nissen's* exception to the causation elements is entirely within the policy grounds of enterprise liability.<sup>53</sup>

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*Directions or Warnings*, 23 SW. L.J. 256, 263-64 (1969). If the instructions are unclear and do not apprise the user of the danger or provide for efficient use of the product, there is simply a failure to discover the defect. This is considered contributory negligence. *Id.* at 279-81. When the failure to heed clear instructions concerning proper use is considered misuse, the trier of fact must determine whether the misuse caused the defect or injury. Thus, misuse of this nature is in reality a causation problem. See Vargo, 1975 *Survey*, *supra* note 29, at 280 n.49.

<sup>51</sup>Causation in fact or the "but for" rule requires: (1) that the activities in question be among the antecedent factors producing the plaintiff's injury and (2) that the result, or the plaintiff's injury, would not exist but for the antecedent conduct. See W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 41 (4th ed. 1971). If the defendant's activities are not a "but for" cause of the plaintiff's harm, the plaintiff cannot recover.

<sup>52</sup>Although the "but for" rule has been considered one of the most constant and "elementary policies of tort law," Klemme, *supra* note 8, at 163, there are exceptions, based upon policy considerations, which reject the "but for" rule because of the inequity of requiring the plaintiff to prove causation in fact when the defendant's activities have prevented the plaintiff from doing so. See, e.g., *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970); *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948).

<sup>53</sup>In *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), the court relaxed the "but for" rule and granted a new trial. One of the grounds for doing so was clearly enterprise liability. The court stated:

This result is also consistent with the emerging tort policy of assigning liability to a party who is in the best position to distribute losses over a group which should reasonably bear them. See generally,

*E. Patent Danger*

In addition to the causation problem, *Nissen* brought forth the following rule:

Generally, the duty to warn arises where the supplier knows or should have known of the danger involved in the use of its product, or where it is unreasonably dangerous to place the product in the hands of a user without a suitable warning. *However, where the danger or potentiality of danger is known or should be known to the user, the duty does not attach.*<sup>54</sup>

An identical rule was adopted in *Burton v. L.O. Smith Foundry Products Co.*,<sup>55</sup> where the plaintiff's decedent was fatally burned when a fellow maintenance employee, using an acetylene torch, accidentally severed a hose containing a highly flammable parting compound. Smith Foundry had supplied the parting concentrate, which was an active ingredient in the parting compound. Although the concentrate contained a small amount of kerosene, its volatility was greatly increased by Smith Foundry's recommended mixing of the concentrate with an equal part of kerosene.

The plaintiff sued Smith Foundry under strict liability in tort, alleging the product was rendered defective by the company's failure to warn. The Seventh Circuit affirmed a summary judgment for the defendant, stating that Smith Foundry's only duty was to warn of unobvious dangerous properties of its product and that any user of kerosene is expected to know that it is flammable.

The court relied on previous cases to hold that an obvious or patent danger does not render the product defective and that "as in negligence law, obvious dangers are not a basis for liability

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Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts* (1961) 70 Yale L.J. 499. In the instant case the defendant motel owner, and more generally the entire class of those who frequent defendant's motel, were, in an economic view, the beneficiaries of the "cost savings" accompanying the non-employment of a life-guard. It is better that this entire group bear the burden of the loss resulting from the "economy" rather than to require one particular guest to absorb the entire loss. By assigning liability to the motel in those cases in which no direct evidence establishes causation, we make sure that all motel guests bear their fair share of these damages, since the motel owner is likely to treat either the costs of liability insurance, or the actual costs of litigation, as a direct expense of its business and establish its fees accordingly.

*Id.* at 775 n.20, 478 P.2d at 477 n.20, 91 Cal. Repr. at 757 n.20.

Thus, the *Nissen* court statement that the policy grounds of § 402A were consistent with an exception to the "but for" rule seems quite appropriate.

<sup>54</sup>332 N.E.2d at 825.

<sup>55</sup>529 F.2d 108 (7th Cir. 1976).

under Section 402A."<sup>56</sup> Somewhat questionable, especially for purposes of summary judgment, was the *Burton* court's conclusion that the danger of fire was obvious to the plaintiff's decedent.<sup>57</sup> Continued adherence to the patent danger rule seems to be an archaic residual of *pre-negligence* law.

Prior to the development of negligence concepts, the manufacturer of a product owed only one duty of care: to disclose latent perils known to him. Consequently, any actions against manufacturers were based upon fraud or deceit for concealing the defect. If the purchaser knew of the defect, no action would lie against the manufacturer since the purchaser could not then prove fraud or deceit.<sup>58</sup> This "limited duty" concept was incorporated into negligence law, being best described in *Campo v. Scofield*,<sup>59</sup> a 1950 New York decision. *Campo* was cited by the Indiana Supreme Court in *J.I. Case v. Sandefur, Inc.*,<sup>60</sup> a decision on a negligence issue; through various interpretations, especially by federal courts, the *Campo* rule has been applied to cases in strict liability in tort.<sup>61</sup>

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<sup>56</sup>*Id.* at 112, citing *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir.), *cert. denied*, 390 U.S. 945 (1967); *Greeno v. Clark Equip. Co.*, 237 F. Supp. 427 (N.D. Ind. 1965); *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964); *Cornette v. Searjeant Metal Prod., Inc.*, 147 Ind. App. 46, 258 N.E.2d 652 (1970).

<sup>57</sup>The trial court in *Burton* granted summary judgment, holding, among other things, that the plaintiff's decedent had knowledge of the dangerous conditions of the parting compound. However, the only acceptable evidence (affidavits, depositions, and exhibits) in the record indicates that it was not known whether any warning had been given until after the accident which caused the fatal injury. Transcript 185-86, 207-24. Summary judgment requires that all conflicts be construed in favor of the non-movant, and it is improper to grant summary judgment if the court is required to choose between conflicting inferences. See *Sarkes Tarzian, Inc. v. United States*, 240 F.2d 467 (7th Cir. 1957). See generally 10 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* §§ 2726-2727 (1973). Thus, summary judgment in *Burton* would seem to be highly questionable unless it was clear that the deceased and his fellow employees had knowledge of the parting concentrate's dangerous propensities *before* the accident occurred. See *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975).

<sup>58</sup>See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 28.5, at 1542 (1956).

<sup>59</sup>301 N.Y. 468, 95 N.E.2d 802 (1950).

<sup>60</sup>245 Ind. 213, 197 N.E.2d 519 (1964).

<sup>61</sup>The *Campo* rule has a rather curious history in Indiana law. In *J.I. Case Co. v. Sandefur*, 245 Ind. 213, 197 N.E.2d 519 (1964), the court cited *Campo* for the proposition that "there must be reasonable freedom and protection for the manufacturer. He is not an insurer against accident and is not obligated to produce only accident-proof machines. The emphasis is on the duty to avoid hidden defects or concealed dangers." *Id.* at 804, 197 N.E.2d at 523. *Campo* was next cited in *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966)—an action based upon negligence, warranties, and strict tort liability—for the proposition that a

The *Campo* case has recently been overruled by the State of New York in *Micallef v. Miehle Co., Division of Miehle-Goss Dexter, Inc.*,<sup>62</sup> in which the court rejected the patent danger rule on several grounds. First, the *Campo* rule is a vestigial carryover from pre-negligence law requiring a finding of deceit for recovery and is not applicable in our highly complex and technological society in which the user easily falls victim to the manufacturer who holds himself out as an expert in his field. The patent danger rule amounts to an assumption of risk as a matter of law without proof that the user subjectively appreciated a known risk. The rule is therefore inconsistent with negligence law which places a

manufacturer has absolutely no duty if the defect is patent or obvious. 359 F.2d at 824. Next, in *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968), the Seventh Circuit cited both *Campo* and *Sandefur* for the rule that a manufacturer's duties are limited to avoidance of latent defects. 384 F.2d at 805. The same court, in *Indiana Nat'l Bank v. DeLaval Separator Co.*, 389 F.2d 674 (7th Cir. 1968), stated that the general rule in Indiana is that a manufacturer's liability is limited to situations where the manufacturer has actual or constructive knowledge of the defect, and cited *Sandefur* for the following proposition: "A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing its product." *Id.* at 677. However, the *Sandefur* opinion actually states:

A manufacturer may determine the character of the materials to be used primarily for the purpose of producing or manufacturing an "economy model," as compared with a luxury model—the life of one being much less than the life of the other. Yet there are reasonable limits on such "economy," for example: a machine may not be built with extremely weak or flimsy parts concealed by an exterior such as to mislead a user into believing it safe and stable when, in fact, it is not, thus causing a user to rely thereon, to his injury.

245 Ind. 213, 222-23, 197 N.E.2d 519, 523 (1964). Later, in *Zahora v. Hernischfeger Corp.*, 404 F.2d 172 (7th Cir. 1968), the court cited *Sandefur* as limiting a manufacturer's duties to the avoidance of latent defects. *Id.* at 176. In *Posey v. Clark Equip. Co.*, 409 F.2d 560 (7th Cir. 1969), the court cited *Sandefur* as limiting manufacturer's duties to latent defects, and held that if the defect is patent there is no duty to warn. *Id.* at 563. Later, the Indiana Court of Appeals in *Dudley Sports Co. v. Schmitt*, 151 Ind. App. 217, 279 N.E.2d 266 (1972), cited *Sandefur*, *Zahora*, and *DeLaval* for the rule that a manufacturer cannot be liable if the defect is obvious or patent. *Id.* at 226, 279 N.E.2d at 274. Next, in *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820 (Ind. Ct. App. 1975), the court cited *Posey* and held that when a danger or potential danger is known or should be known by the user there is no duty to warn. *Id.* at 825. Finally, in *Burton v. L.O. Smith Foundry Prod. Co.*, 529 F.2d 108 (7th Cir. 1976), the court cited *Nissen*, *Schemel*, and *Sandefur*, and held that if it is unreasonable for the manufacturer to assume that the user is ignorant of the defect or danger there is no duty to warn, and under Indiana law a product cannot be considered defective for purposes of strict liability pursuant to § 402A if the defect is patent. *Id.* at 111, 112.

<sup>62</sup>39 N.Y.2d 376, 348 N.E.2d 571 (1976).

duty on the manufacturer to develop a reasonably safe product while eliminating the same duty by granting immunity for patent perils without regard to whether the user perceived the danger. The *Campo* rule also ignores foreseeability, and patent perils are merely factors to be considered. They should not preclude liability. Negligence law ought to discourage misdesign and defects rather than to encourage them in an obvious form. Finally, a manufacturer stands in a superior position to recognize and cure defective products.

While legal writers<sup>63</sup> and well-reasoned cases<sup>64</sup> have rejected the patent danger rule on grounds similar to *Micallef*, the overruling of the *Campo* case by New York's highest court has had no effect on Indiana law. The question remains whether Indiana should retain "limited duty"<sup>65</sup> concepts and pre-negligence rules in

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<sup>63</sup>1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY §§ 7.01, 7.02 (1976); 2 *id.* § 16A[4][e] (1976); HARPER & JAMES, *supra* note 58, at 1542-46; D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 151-53 (1974); Keeton, *Products Liability—Inadequacy of Information*, 48 TEX. L. REV. 398, 400 (1970); Marschall, *An Obvious Wrong Does Not Make A Right: Manufacturers' Liability For Patently Dangerous Products*, 48 N.Y.U.L. REV. 1065, 1114 (1973); Noel, *Manufacturer's Negligence of Design or Directions For Use Of A Product*, 71 YALE L.J. 816, 837-38 (1962); Twerski, *From Codling, To Bolm, To Velez: Triptych of Confusion*, 2 HOFSTRA L. REV. 489 (1974).

<sup>64</sup>*See, e.g.*, Luque v. McLean, 8 Cal. 3d 136, 501 P.2d 1163, 104 Cal. Rptr. 443 (1972); Palmer v. Massey-Ferguson Inc., 3 Wash. App. 508, 476 P.2d 713 (1970).

<sup>65</sup>The development of the *Campo* rule to exclude a seller's liability was closely associated with the advent of the "intended use" doctrine, another "limited duty" concept again developed by federal court interpretations of Indiana law. The rule can be traced through *Zahora v. Hernischfeger Corp.*, 404 F.2d 172 (7th Cir. 1968); *Indiana Nat'l Bank v. DeLaval Separator Co.*, 389 F.2d 674 (7th Cir. 1968); *Schemel v. General Motors Corp.*, 384 F.2d 802 (7th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968); *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). The "intended use" rationale stemmed from early negligence cases denying recovery to the user of a product when the particular use was neither intended nor *actually* foreseen by the manufacturer. Liability was limited to situations in which the product was used for "a purpose for which it was intended." RESTATEMENT (FIRST) OF TORTS § 395 (1938). Thus, the use of the product was restricted to the manufacturer's subjective standard, placing an insurmountable burden of proof on the plaintiff. Note, *Misuse As A Bar To Bystander Recovery Under Strict Products Liability*, 10 HOUSTON L. REV. 1106, 1109 (1973) [hereinafter cited as *Bar To Bystanders*]. However, the "limited duty" concept of the "intended use" doctrine has been rejected by the Restatement, legal writers, and most courts. *See* RESTATEMENT (SECOND) OF TORTS § 395 (1965); *Bar To Bystanders*, *supra* at 1109 nn.21 & 22; *Flammable Fabrics Act*, *supra* note 49, at 413 n.99. The concept has been replaced either by an objective foreseeability doctrine, *see, e.g.*, *Spruill v. Boyle-Midway, Inc.*, 308 F.2d 79, 87-88 (4th Cir. 1962), or by the rejection of duty as a basis of liability, *see, e.g.*, *Berkebile v. Brantly Helicopter Corp.*, 337 A.2d 893 (Pa. 1975).

a strict products liability context since section 402A supposedly has eclipsed duty principles and rejected fault concepts as a basis of liability.

#### XIV. Professional Responsibility

*Charles D. Kelso\**

The Indiana Supreme Court continues active development of this area. During the survey period the court (1) elaborated procedures for Disciplinary Commission investigations and for dealing with the aftermath of suspension or disbarment; (2) made several amendments to the Indiana Code of Professional Responsibility;<sup>1</sup> (3) identified detailed sanctions for lawyer misconduct and circumstances constituting mitigation; and, (4) perhaps most importantly, announced its determination to enforce the Code rigorously.

##### A. Enforcement of the Code

###### 1. General Policy

As the supreme court has begun more frequently to impose sanctions short of disbarment, such as public reprimand, it has also begun to insist that lawyers follow Code provisions strictly, rather than rely on conscience or good intentions for guidance. A landmark declaration of policy was announced in *In re Gerald*

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<sup>1</sup>The Indiana Code of Professional Responsibility [hereinafter referred to as the Code of Professional Responsibility or the Code] follows the American Bar Association Code of Professional Responsibility [hereinafter referred to as the ABA CODE]. Indiana adopted this version of the ABA Code in 1971.

The Code contains Ethical Considerations [hereinafter referred to as ECs], which represent the objectives toward which every member of the profession should strive and Disciplinary Rules [hereinafter referred to as DRs], which are mandatory in character and state the minimum level of conduct below which no lawyer may fall without being subject to disciplinary action.



*G. Fuchs*,<sup>2</sup> a case involving commingling of client funds in an attorney's personal account. The court said,

[W]e are not unmindful of reality, and we know that notwithstanding ethical proscriptions against such conduct, the commingling and temporary borrowing of clients' funds, although not a common practice, has nevertheless been engaged in by a considerable number of otherwise competent and ethical lawyers. We attribute this to carelessness and arrogance rather than dishonesty. Until recently, the enforcement of professional ethics has been lax, and doubtlessly many lawyers have been lulled into a sense of false security, believing that one's own conscience and good intentions are sufficient guides for the conduct of his professional affairs. We are determined to improve the public image of the legal profession in this state through the rigorous enforcement of the Code of Professional Responsibility adopted in 1971.<sup>3</sup>

Respondent attorney had commingled client funds with his own, depositing settlement checks in an account he used for both personal and professional affairs. During the period between deposit and eventual return of the funds to the client, the attorney's account had dropped substantially below the amount of the proceeds he had received for the client. Checks written to the client during this period were returned for insufficient funds.

The supreme court, holding that respondent had violated his oath as an attorney and Disciplinary Rules 9-102(A) and (B),<sup>4</sup> suspended the attorney for not less than ninety days and assessed costs.

The court indicated that the sanction was substantially less severe than called for by respondent's conduct and warned that such misconduct will be dealt with more severely in the future. Explaining its leniency, the court said:

Since the adoption of [the] Code and the establishment of our Disciplinary Commission . . . this is the first case of this nature to come before us; and while we will not hesitate to invoke more severe sanctions for such conduct in the future, we believe that disbarment or a lengthy suspension in this case would be unwarranted in view of

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<sup>2</sup>340 N.E.2d 762 (Ind. 1976).

<sup>3</sup>*Id.* at 764.

<sup>4</sup>DRs 9-102(A) and (B) prohibit commingling and require prompt accounting and payment.



both our prior laxity and the Respondent's prior good record.<sup>5</sup>

2. *Conflict of Interest; Public Reprimands Ordered in Multiple Client Cases*

In *In re Farr*,<sup>6</sup> a case decided the same day as *Fuchs*, the court also ordered a public reprimand, but indicated that only the presence of mitigating circumstances had prevented imposition of a more severe penalty. The case involved multiple clients and conflict of interest. To carry forward its policy of giving the bar adequate warning about future severity, the court presented the full report of the hearing officer, explaining that practitioners need to consider very carefully the problems which arise in representing clients who may have conflicting interests. The court said:

The very complicated circumstances of this case present classic and intricate questions of conflicts of interest and the impropriety and appearance of impropriety that may flow therefrom, which this Court believes are matters frequently overlooked by otherwise highly ethical lawyers. In view of the recent origin of our program for the discipline of lawyers of this state and the improvement of the public image of the legal profession, the publication of the adopted findings and conclusion in full is warranted, in order that all may be adequately forewarned of the delicate balance often obtaining between ethical and unethical practices and the attitude of this Court regarding sanctions for violations.<sup>7</sup>

The mitigating circumstances which restrained the court from invoking a sanction more severe than public reprimand were substantial: The misconduct was not motivated by a desire for personal gain; respondents had years of reputable practice; they had withdrawn from the complainants' case when they had "second thoughts" about the propriety of representing multiple clients; there was no indication that the clients were detrimentally affected by the lawyers' misconduct; respondents had cooperated fully in making every bit of evidence available to the Disciplinary Commission and the hearing officer.

What was the misconduct that required all this mitigation to restrain the court from a severe sanction? The Code provisions

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<sup>5</sup>340 N.E.2d at 764.

<sup>6</sup>340 N.E.2d 777 (Ind. 1976).

<sup>7</sup>*Id.* at 779.

which give the facts meaning are Disciplinary Rules 5-105(B) and (C):

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interests of each and if each consents to the representation after full disclosure of the possible effects of such representation on the exercise of his independent professional judgment on behalf of each.<sup>6</sup>

Respondents undertook to represent Mrs. Smiley and her fourteen-year old son Michael, who had been seriously injured as a guest passenger in an automobile driven by "Crooks I." Crooks I was a nonlicensed driver with a poor driving record and a predilection for intoxicating beverages. He had been drinking on the evening of the accident, and appeared drunk to Michael. The owner of the car was "Crooks II," who had entrusted his car to Crooks I, his son. The accident occurred when the car driven by Crooks I collided with a car driven by a town marshal who was travelling at a high rate of speed at night without headlights or emergency lights. Shortly before the accident, he had been on the left hand side of the road.

The problem of conflicting interests arose from the fact that respondents undertook to represent not only Mrs. Smiley and Michael, but also Crooks I (in a criminal action for driving a vehicle under the influence, etc., in which he was found guilty by a jury, though the decision was reversed on appeal); and Crooks I, Crooks II, and their insurance company (in civil actions brought by the marshal and the town which owned the car he had been driving).

Michael and his mother were told by respondents that Michael did not have a case for negligence or for wanton and willful misconduct against Crooks I because Michael had stated it did not appear that Crooks I had been driving in a drunken manner and Crooks I had swerved to the left to avoid the oncoming police car. Michael was told that it was "all right" to give a statement to the insurance company.

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<sup>6</sup>INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DRs 5-105(B) and (C).

It appeared that respondents were quite diligent in their representation of the insurance company, giving it more than thirty written reports in connection with representing Crooks I. These reports analyzed and discussed matters bearing upon Michael's case. There was some discussion between respondents and Mrs. Smiley regarding their dual representation, but there was no discussion about the significance of disclosing confidences to Crooks I or to the insurance company. Nor did the attorneys ever reveal to or discuss with Mrs. Smiley the possibility of a suit against Crooks II for negligent entrustment—a theory to which the attorneys had devoted much attention in their written reports to the insurance company made in connection with defending suits brought by the marshal.

Thus, Mrs. Smiley was not made aware of the possibility of an action for negligent entrustment or given an opportunity to decide whether to forego it, as she had on the guest case theory against Crooks. Nor was she ever made aware of the conflict of interest between herself and Crooks II.

The hearing officer (and, ultimately, the court) found that this was a violation of DR 5-105(C). In supporting the conclusion that this failure to disclose was misconduct, the court quoted EC 7-8 in full.<sup>9</sup> Thus, its detailed explanation of the advising process was imported into the disclosure requirements of DR 5-105(C).

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<sup>9</sup>The Code provides:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from assertion of legally permissible positions. In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. In the event that the client in a non-adjudicatory matter insists upon a course of conduct that is contrary to the judgment and advice of the lawyer but not prohibited by Disciplinary Rules, the lawyer may withdraw from the employment.

INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-8.

Another case in which ethical considerations were used as something more than mere aspirational guidelines was *Pierce v. Yochum*, 330 N.E.2d 102 (Ind. Ct. App. 1975). The court, cautioning attorneys against an incomplete recitation of the facts in an appellate brief, said:

The *Farr* case surely cautions lawyers to be quite thorough in handling situations where there are conflicts of interest. That caution was underscored on July 7, 1976, when the court decided *In re Smith*.<sup>10</sup> In *Smith*, the respondent was employed by the Pittmans to collect an unliquidated claim owed them. An arrangement was entered into whereby their debtor was to pay respondent \$40 a month, which he would pay over, minus his fee, to the Pittmans until they had been paid in full. While that arrangement was still in effect, respondent was employed by a Mr. Larr to collect all outstanding unpaid accounts of an elevator and feed company. One of those claims was against Mr. Pittman, although respondent did not know this at the time.

Respondent's secretary sent a form letter to all the debtors, including Mr. Pittman, stating that if satisfactory arrangements were not made for collection it would be necessary to bring suit. Respondent's first actual knowledge of the conflict came when Mrs. Pitmann telephoned him about the matter. Respondent explained that he could not represent the feed company in any formal proceedings against the Pittmans with regard to the account. However, he negotiated an oral agreement whereby he would take the proceeds being received monthly on the Pittmans' behalf and apply them to the feed company account. This agreement was terminated a few days later by the Pittmans and respondent notified Larr that he could not represent him in the matter. No proceeds were actually paid over to Larr, and the Pittmans were paid in full under the prior agreement.

The supreme court found that the conflict of interest was so apparent and irreconcilable that the attorney had no alternative but to decline to represent his second-acquired client, Larr, in the collection matter against the Pittmans. He should have declined representation immediately upon learning of the multiple client situation. Negotiating settlement of the Larr claim was held to be misconduct. Said the court:

A lawyer's fiduciary obligation is not met by making temporary arrangements to mold the needs of a particular

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[W]e find it disturbing that too often phrases or parts of testimony are lifted from context to support a particular argument. This procedure we do not condone. We realize that not all of what one witness may say will be supportive, and that, therefore, not all of the testimony will be included in the brief. However, when testimony is included in the brief it should be set out *as it is in the record*. Also, in the facts portion of the brief, personal opinion or comment should be kept to a minimum, if necessary at all. See, Code of Professional Responsibility, Ethical Considerations 7-19, et. seq.

*Id.* at 112 (emphasis in original).

<sup>10</sup>351 N.E.2d 1 (Ind. 1976).

client into the ethical structures that are established by the Code of Professional Responsibility. The respondent attempted to do this through an intra-office transfer of funds. This falls far short of the duty owed a client.<sup>11</sup>

The attorney was given a public reprimand and apparently was saved from more severe sanctions only by mitigating circumstances, including the fact that the multiple representation eventually was terminated, there was no other impropriety, the attorney had a fine reputation in his community, and the incident appeared to be an isolated event for which the attorney was sincerely apologetic.<sup>12</sup>

### 3. *Sanctions More Severe Than Reprimand*

Respondent in *In re Lewis*<sup>13</sup> had been convicted for failing to file an income tax return. He had pled guilty, paid a fine, filed the return, paid all taxes and penalties, and been respectful, cooperative and genuinely contrite concerning his misconduct. Also, no client had been harmed by the misconduct. The court ordered suspension for not less than thirty days. It indicated that a petition for reinstatement would be granted after that time unless objections were filed thereto by the Disciplinary Commission.

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<sup>11</sup>*Id.* at 3.

<sup>12</sup>Other public censures were administered by the court. The failure to file a bankruptcy petition or to make any arrangements concerning it, despite an agreement to do so, was held to constitute a violation of the oath of an attorney and a violation of DR 6-101(A)(3) (neglecting a legal matter entrusted to a lawyer); DR 7-101(A)(1), (2), and (3) (failing to seek a client's lawful objectives by reasonably available means and to carry out a contract of employment); DR 1-102(A)(5) (engaging in conduct prejudicial to the administration of justice); and DR 1-102(A)(6) (conduct reflecting adversely upon fitness to practice law). *In re Ackerman*, 330 N.E.2d 322 (Ind. 1975). With respect to a fee, part of which was paid in advance, the court reversed its previous holding in *In re Case*, 311 N.E.2d 797 (Ind. 1974), and adopted the dissenting view of Justice DeBruler to the effect that restitution cannot properly be ordered in a disciplinary proceeding (though the court added that in good conscience restitution ought to be made). The theory of the majority was that in a civil action for restitution the attorney would have defenses, including setoff, that would not be available in disciplinary proceedings. Damages and restitution were held not essential to the main purpose of disciplinary proceedings, which is to regulate the conduct of lawyers in the public interest.

In *In re Kuzman*, 335 N.E.2d 210 (Ind. 1975), the court based its decision on the old Canons rather than the Code because the misconduct occurred before adoption of the Code. That distinction was a factor limiting the sanction to reprimand.

<sup>13</sup>329 N.E.2d 571 (Ind. 1975).

In another case, respondent was suspended for not less than ninety days and required to pay costs for commingling client funds with his own and for failing to file a divorce though he had accepted and not returned a retainer fee to do so.<sup>14</sup> The penalty would have been more severe, said the court, were it not for mitigating circumstances. Respondent had had severe alcoholic problems stemming from the hospitalization and death of his wife, but, having remarried, was coping successfully.

In *In re Long*,<sup>15</sup> respondent had closed his law office and was attempting to dispose of all the business he then had, including a number of overdue probate matters. The court suspended respondent until he could prove that all overdue matters had been turned over to a practicing attorney for final disposition.

In another matter, the court refused to reinstate an attorney who appeared to the court to lack knowledge of legal procedure or of the rules of evidence, or even a routine knowledge of the substantive law and the essential nature and issues of a hearing. It referred the attorney to the specifics which must be satisfied in a petition for reinstatement, set forth in section 4 of Rule 23 of Indiana Rules for Admission to the Bar and the Discipline of Attorneys.<sup>16</sup>

## B. Professional Responsibility Problems in Criminal Cases

### 1. Claims of Incompetent Counsel

Again this year there were a number of appeals from denial of petitions for post-conviction relief on the ground that defendant had not been provided with effective assistance of counsel. The standard applied by the court in ruling on such a petition is not the same standard it uses to determine misconduct under the Code. Instead, as the court said in *Campbell v. State*,<sup>17</sup> "Instances of poor strategy, improvident tactics, or inexperience do not conclusively amount to ineffective assistance of counsel, unless, when taken in their entirety, the trial was a mockery of justice."<sup>18</sup>

In *Campbell* it was charged that defense counsel failed to discuss possible defenses with petitioner. However, the court said, there was no showing that failure to discuss possible defenses resulted in the denial of effective counsel. The court pointed out that counsel was present at arraignment and two habeas corpus

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<sup>14</sup>*In re Althaus*, 348 N.E.2d 407 (Ind. 1976).

<sup>15</sup>334 N.E.2d 688 (Ind. 1975).

<sup>16</sup>*In re Perrello*, 341 N.E.2d 499 (Ind. 1976).

<sup>17</sup>329 N.E.2d 55 (Ind. Ct. App. 1975).

<sup>18</sup>*Id.* at 57.

hearings, conducted cross-examination, asked preliminary questions, and filed a motion for a new trial on what he felt were the only viable issues.

The public defender asked the supreme court to abandon the "mockery of justice" and "shocking to the conscience" test in *Bucci v. State*<sup>19</sup> and to use, instead, a standard favored by numerous federal courts—whether counsel's assistance was "reasonably likely to have rendered and did render reasonably effective assistance."<sup>20</sup> The public defender argued that the federal standard was more objective. The court rejected the argument, stating:

The search for objectivity should not obscure common-sense analysis. Indeed, if objectivity is thought to be that which excludes relativity, we cannot see that the federal standard is objective. From the point of view of a sensible defendant, any and all assistance of counsel which results in a verdict and sentence more severe than he wishes is *ineffective* assistance. We adhere to the standard consistently followed by our courts for many years.<sup>21</sup>

Justice DeBruler, dissenting, was concerned that defense counsel had apparently believed, erroneously, that if they participated in the trial they would waive the right to appeal based on a claim that the trial judge had committed error by reassuming jurisdiction of the case after counsel had failed timely to strike from a change of venue panel appointed by the judge. As a result, said Justice DeBruler, they did not conduct voir dire, made no statement to the jury, made no objections to the introduction of exhibits, cross-examined no witnesses, tendered no instructions, and offered no objections to any instructions. Nor did they present any defense witnesses. Their mistake, concluded Justice DeBruler, effectively denied defendants the representation of counsel to which they were entitled by the Constitution.

Supporting the majority's conclusion to the contrary was the fact that pretrial tactics had resulted in two of the original four charges being dropped; that the prosecutor suggested the case was thoroughly defended; and that he thought the attorneys moved for a change of venue merely for the purpose of creating error in the record. However, the fatal flaw in the defendants' presentation was that they did not establish to the majority's satisfaction how the attorneys' conduct had harmed them: "It has not been alleged

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<sup>19</sup>332 N.E.2d 94 (Ind. 1975).

<sup>20</sup>*Id.* at 95.

<sup>21</sup>*Id.*

or demonstrated that some other reasonably foreseeable defense tactic would have better protected these defendants.”<sup>22</sup>

In at least eight other cases, the defendant did not prevail in an effort to show, in post-conviction proceedings, that there had been a denial of effective counsel.<sup>23</sup> In direct appeals, defendants did not fare better. The court found in several cases that the proof offered by the defendant failed to support the charge made against counsel or that, even if the charge were assumed to be fact, it amounted to a trial tactic that did not shock the conscience of the court.<sup>24</sup>

## 2. *Behavior of Prosecutor and Judge*

The Code, in EC 7-13 and in DR 7-103, calls upon the prosecutor to make timely disclosure to counsel for the defendant any evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment. Consistent with these principles, the supreme court

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<sup>22</sup>*Id.*

<sup>23</sup>*Jackson v. State*, 339 N.E.2d 557 (Ind. 1975) (charge of minimal consultation, failure to call two additional witnesses to corroborate alibi already testified to by three witnesses, and failure adequately to discuss with petitioner the handling of plea bargaining in an unrelated case); *Hunt v. State*, 338 N.E.2d 641 (Ind. 1975) (incompetence not shown by failure to seek a continuance when the state added an unlisted witness who merely identified the body of the decedent); *Johnson v. State*, 337 N.E.2d 483 (Ind. 1975) (attorney only conferred with his client two or three times prior to trial); *Davis v. State*, 330 N.E.2d 738 (Ind. 1975) (attorney failed to object when a police detective made reference to prior arrests and did not offer a witness on whether the confession was voluntary); *Gross v. State*, 338 N.E.2d 663 (Ind. Ct. App. 1975) (counsel failed to move that defendant be allowed to withdraw his plea of guilty when he received an executed sentence); *Greentree v. State*, 334 N.E.2d 98 (Ind. Ct. App. 1975) (no evidence that subpoenaing a particular witness would have affected the result); *Ray v. State*, 333 N.E.2d 317 (Ind. Ct. App. 1975) (no indication provided as to why failure to question a bailiff created a mockery, and signing a supplemental transcript in obedience to an order of the court was not shocking to the conscience); *Casterlow v. State*, 329 N.E.2d 630 (Ind. Ct. App. 1975) (trial attorney did not introduce evidence that the defendant had made a large withdrawal of money from his account on Dec. 6 which could help account for the \$670 found on him the day after the robbery, Dec. 28).

<sup>24</sup>*Case v. State*, 348 N.E.2d 394 (Ind. 1976) (mere fact that defendant had three different attorneys representing him during the proceeding did not establish that he lacked effective assistance of counsel); *Wilson v. State*, 333 N.E.2d 755, 764 (Ind. 1975) (court found attorney had performed in an “honorable, intelligent and spirited manner”); *Delph v. State*, 332 N.E.2d 783 (Ind. 1975) (attorney left courtroom on two occasions, failed to subpoena a person who allegedly would have testified in a favorable manner, and failed to call court’s attention to an alleged deal made by state’s witnesses in return for testimony unfavorable to defendant).



held in *Newman v. State*<sup>25</sup> that defendant was entitled to a reversal in a case in which the prosecutor withheld evidence going to the reliability of a particular witness. Specifically, the evidence indicated that there had been an agreement regarding leniency if the witness, a co-conspirator, would testify against the accused.

However, the court did not find it sufficient for a mistrial in *Chatman v. State*<sup>26</sup> that the prosecutor in his opening statement alluded to evidence whose admissibility was under advisement. The court merely commented, "At best, in most circles, it would be regarded as unprofessional practice—as would a misstatement to the Court of the sequence of events."<sup>27</sup>

Again, the court said in *Clark v. State*<sup>28</sup> that it was highly improper for the prosecutor to have suggested that the jury must disregard certain defense testimony and to have implied that refusal to disregard the testimony would be a failure of civic duty and would bind other juries in criminal cases, as a kind of precedent. The court said that the trial judge should have sustained an objection and instructed the jury to disregard the remarks. However, the court did not reverse because it found that other evidence was sufficient to sustain the conviction.

In *Clark* and *Chatman* the prosecutors' conduct would appear at least to raise questions of compliance with the Code, which provides: "In appearing in his professional capacity before a tribunal, a lawyer shall not: (1) state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."<sup>29</sup>

In keeping with the court's announced policy to enforce the Code strictly, it would seem that when a prosecutor engages in unprofessional conduct, even if it falls short of reversible error, the court might find opportunities to remind all prosecutors that as lawyers they are bound by the Code.

Similarly, the court had an opportunity to make reference to the Code of Judicial Conduct in *Anderson v. State*,<sup>30</sup> in which the judge became involved in the plea bargaining process and the record did not show that the plea of guilty was entered voluntarily. The conviction was reversed, but no mention was made of the Code of Judicial Conduct.<sup>31</sup>

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<sup>25</sup>334 N.E.2d 684 (Ind. 1975).

<sup>26</sup>334 N.E.2d 673 (Ind. 1975).

<sup>27</sup>*Id.* at 679.

<sup>28</sup>348 N.E.2d 27 (Ind. 1976).

<sup>29</sup>INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-106(C) (1).

<sup>30</sup>335 N.E.2d 225 (Ind. 1975).

<sup>31</sup>In a related development, the court noted in *Stein v. State*, 334 N.E.2d 698 (Ind. Ct. App. 1975), that a trial judge has discretionary power to disqualify himself *sua sponte* whenever any semblance of judicial bias or

*C. Amendments to the Code of Professional Responsibility  
and to Disciplinary Rules*

By adopting Admission and Discipline Rule 26, the supreme court responded to American Bar Association concern about making group legal service plans available to the public.<sup>32</sup> Rule 26 requires annual reporting and specifies what a group legal service plan must include before an attorney may render services pursuant to the plan.<sup>33</sup>

impropriety in a proceeding in his court comes to his attention. When he has an actual prejudice in reference to a cause or is interested in the litigation or related to a party, justice requires that he refuse to hear the case. The fact arousing concern was that one of appellant's friends had exhorted leniency to the judge in the presence of the appellant. The court said there was a sufficient basis for discretionary self-disqualification, but the record contained no evidence of actual prejudice sufficient to require disqualification.

Related to the sua sponte power of the trial judge is the power of the court on appeal to reverse if it notes an error so fundamental that the defendant could not have received a fair trial. In *Winston v. State*, 332 N.E.2d 229 (Ind. Ct. App. 1975), the doctrine was discussed but the court held that failure of counsel to object to the introduction of heroin constituted a waiver of an objection based upon an illegal search and seizure claim, and did not call for application of the doctrine of fundamental error.

<sup>32</sup>In February 1975, the American Bar Association amended its Code of Professional Responsibility by adding EC 2-23, which encourages attorneys to cooperate with qualified legal assistance organizations providing prepaid legal services.

<sup>33</sup>Admission and Discipline Rule 26 became effective in Indiana Jan. 31, 1976. It provides that no lawyer may render legal services pursuant to a group legal service plan unless the following conditions are satisfied:

(1) The entire plan shall be reduced to writing and a description of its terms shall be distributed to the members or beneficiaries thereof;

(2) The plan and description shall:

(a) state clearly and in detail the benefits to be provided, exclusions therefrom and conditions thereto;

(b) describe the extent of the undertaking to provide benefits and reveal such facts as will indicate the ability of the plan to meet the undertaking;

(c) provide that there shall be no infringement upon the independent exercise of professional judgment of any lawyer furnishing service under the plan;

(d) specify that a lawyer providing legal service under the plan shall not be required to act in derogation of his professional responsibilities;

(e) set forth procedures for the objective review and resolution of disputes arising under the plan;

(3) There shall be a periodic written report not less often than annually disclosing to members or beneficiaries of the plan, to the executive secretary of the disciplinary commission a summary of the operations of the plan, including, but not limited to, all relevant

The Code of Professional Responsibility allows lawyers to form a professional corporation for the practice of law,<sup>34</sup> but it does not contain guidelines or procedures for incorporators. By adopting Admission and Discipline Rule 27,<sup>35</sup> the court established clear requirements for lawyers who wish to form professional service corporations for the sole purpose of practicing law in Indiana. All shareholders must be persons who (1) are duly licensed by the Indiana Supreme Court to practice law; (2) practice law in Indiana; and (3) at all times own their share in their own right.<sup>36</sup>

Disciplinary Rule 23 was amended this year by adding probation to the list of specified sanctions for misconduct.<sup>37</sup> The other listed sanctions are disbarment, suspension, and public or private reprimand, but the court may not be limited to this growing list of sanctions.<sup>38</sup>

Analogous to the expanding range of sanctions is the expanding scope of authorization granted the Disciplinary Commission to conduct investigations. The executive secretary of the commission, in conducting an investigation of any grievance now may "investigate matters other than those set out in the grievance, including the professional conduct of the attorney generally."<sup>39</sup>

Additional charges of misconduct not contained in a grievance may be included in a complaint filed against the attorney after notice has been given by the executive secretary and the attorney has had an opportunity to reply.<sup>40</sup> It is to be hoped that this

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financial data, the number of members or beneficiaries receiving legal services, and the kinds of benefits provided.

IND. R. ADMISS. & DISCP. 26.

<sup>34</sup>A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if: (1) a non-lawyer owns any interest therein . . . (2) a non-lawyer is a corporate director or officer thereof; or (3) a non-lawyer has the right to direct or control the professional judgment of the lawyer. INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-107(C). *See also* EC 5-24.

<sup>35</sup>The rule became effective Jan. 1, 1976.

<sup>36</sup>IND. R. ADMISS. & DISCP. 27.

<sup>37</sup>*Id.* 23(3)(c) (as amended) became effective Jan. 31, 1976.

<sup>38</sup>*Id.* 23(3)(a) does not purport to contain an exclusive listing. Also, part (1)(d) of this rule allows the commission and respondent to agree upon the discipline to be imposed, subject to court approval.

<sup>39</sup>*Id.* 23(10)(d).

<sup>40</sup>Rule 23 also provides:

In the event that the executive secretary or the commission should consider any charges of misconduct against an attorney not contained in the grievance, the executive secretary shall notify the attorney of the additional charges under consideration, and the attorney shall have the opportunity to make a written response to the additional

flexibility of investigation is not interpreted by the commission or the court to authorize mere "fishing expeditions" into the affairs of an attorney which are not related to a charge of misconduct.

A new section added to Rule 23 imposes additional duties on attorneys who are disbarred or suspended.<sup>41</sup> An attorney who has been disbarred now must promptly notify all clients currently represented by him and advise the clients to obtain legal counsel elsewhere. The disbarred attorney must also move for withdrawal in any pending court proceeding and make available to his clients and their new counsel all papers, documents, files and other information in his possession. Finally, the rule requires a disbarred attorney to file an affidavit with the court, within thirty days, showing that he has complied with the court's order and with the rule. Similar provisions are applicable to attorneys who have been suspended.<sup>42</sup> Proof of compliance with these rules is a condition precedent to reinstatement.<sup>43</sup> If a disbarred or suspended attorney fails or is unable to comply with the rule, the circuit court judge in the county of the attorney's practice is required to appoint another attorney to inventory the files of the disbarred or suspended attorney and to take such action as may be appropriate to protect the interests of the attorney and his clients.<sup>44</sup>

The supreme court still has not created a commission or agency with responsibility to advise the court on a continuing basis concerning desirable amendments to the Code or the Disciplinary Rules. Thus, as pointed out in last year's review of this area,<sup>45</sup> the Code as it now stands in Indiana is different in several important respects from the Code currently approved by the American Bar Association. For example, in Indiana an attorney is still called upon to reveal his client's fraud to an affected person or tribunal, even if the information would otherwise be protected as a privileged communication.<sup>46</sup> Regardless of the court's view on this particular matter, it is to be hoped that the court will someday deal

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charges under consideration within twenty (20) days after the receipt of such notification.

*Id.* 23 (10) (d).

<sup>41</sup>*Id.* 26(a).

<sup>42</sup>*Id.* 26(b) (1) and (2).

<sup>43</sup>*Id.* 26(a) (5) and (b) (3).

<sup>44</sup>*Id.* 27. This rule also provides that "any attorney so appointed shall not disclose any information contained in such files without the consent of the client to whom such file relates, except as necessary to carry out the order of the court which appointed him."

<sup>45</sup>Kelso, *Professional Responsibility, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 281, 283-86 (1975).

<sup>46</sup>INDIANA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-102(B).

with the need for continuing coordination between its efforts in this field and compatible efforts by the American Bar Association and by the Indiana State Bar Association.

Incidentally, in closing it should be noted that the court and other lawyers in Indiana are well served in the area of Professional Responsibility by *Res Gestae*, the monthly magazine of the Indiana State Bar Association. It has regularly printed proposed rules affecting the area of professional responsibility, and almost every issue has carried one or more articles, notices, messages, or features on this important subject.

## XV. Property

*Ronald W. Polston\**

Several significant cases involving property rights were decided by the Indiana courts during the survey year. Four classes of cases are discussed below: (1) right of a remote vendee to recover on the implied warranty of habitability of a builder-vendor, (2) landlord and tenant relationships, (3) liability for interference with the flow of surface waters, and (4) survivorship rights in personal property held by joint tenants. Other classes of cases decided during the year, but not discussed in detail below, include the following: subdivision covenants,<sup>1</sup> condemnation by state<sup>2</sup> and federal authorities,<sup>3</sup> remedies of the seller under conditional land

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The author thanks Philip C. Thrasher for his assistance in preparation of this discussion.

<sup>1</sup>In *Highland v. Williams*, 336 N.E.2d 846 (Ind. Ct. App. 1975), the appellant was required to remove his home from his subdivision lot because it was deemed to be in violation of a subdivision covenant and he failed to prove that there had been a radical change in the subdivision, an abandonment of the subdivision's general plan, a substantial prior nonconformity, or laches.

<sup>2</sup>In *Alabach v. Northern Indiana Pub. Serv. Co.*, 329 N.E.2d 645 (Ind. Ct. App. 1975), the court held that a public utility with power of eminent domain need not obtain approval from the Public Service Commission of the quantity or location of its land acquisitions. *See also* *Harding v. State ex rel. Dep't of Natural Resources*, 337 N.E.2d 149 (Ind. Ct. App. 1975) (condemnation awards do not include attorney's fees for the defendant).

<sup>3</sup>*United States v. 573.88 Acres of Land*, 531 F.2d 847 (7th Cir. 1976) (a commission's award will not be held "clearly erroneous" when the record shows that the commission was given adequate instructions, weighed conflicting evidence, and granted awards consistent with the evidence submitted).

contract,<sup>4</sup> zoning,<sup>5</sup> real property taxation,<sup>6</sup> and mechanics' liens.<sup>7</sup>

<sup>4</sup>In the continuing saga of vendor's remedies against a purchaser defaulting on a conditional land contract, the plaintiff-appellant in *Skendzel v. Marshall*, 330 N.E.2d 747 (Ind. 1975), appealed the trial court judgment as not conforming to the guidelines set forth in the landmark decision of the Indiana Supreme Court, *Skendzel v. Marshall*, 261 Ind. 226, 301 N.E.2d 641 (1973). On remand the trial court awarded the plaintiff-appellant the principal sum remaining unpaid on the contract and real estate taxes paid by her plus 8 percent interest, attorney's fees of \$1,000, and half the costs and "accruing" costs of the action from the proceeds of sale of the real estate. The foreclosure sale was stayed for 65 days to give defendants an opportunity to redeem. The supreme court upheld this judgment as being neither inequitable nor insufficient. However, in *Donaldson v. Sellmer*, 333 N.E.2d 862 (Ind. Ct. App. 1975), the court allowed forfeiture rather than requiring a foreclosure proceeding and awarded seller damages for repair costs in excess of amounts paid by purchaser under the contract. In *Donaldson* the purchaser defaulted in payment of property insurance, fell three months behind on contract payments, failed to maintain the property in a good state of repair, and executed a second conditional contract to sell the real estate to a third party without the seller's permission. *Skendzel*; *Tidd v. Stauffer*, 308 N.E.2d 415 (Ind. Ct. App. 1974); and *Goff v. Graham*, 306 N.E.2d 758 (Ind. Ct. App. 1974) were cited in support of the holding. The rationale for allowing forfeiture in this case was the fact that the cost to return the property to its original condition and reimburse the seller for her additional interim expenses exceeded the equity of the purchaser. This case is also discussed in Townsend, *Secured Transactions & Creditors' Rights*, *infra* at 315.

<sup>5</sup>In *City of Beech Grove v. Schmitt*, 329 N.E.2d 605 (Ind. Ct. App. 1975), the court discussed the elements of "existing non-conforming use" and types of alternation of the premises which are permissible under a zoning code exemption. *Board of Zoning Appeals v. Shell Oil Co.*, 329 N.E.2d 636 (Ind. Ct. App. 1975), included a holding that the date of filing of an application for a building permit determines the date of the applicable zoning law. The court in *City of Evansville v. Reis Tire Sales, Inc.*, 333 N.E.2d 800 (Ind. Ct. App. 1975), held that zoning is a valid exercise of police power, but when a zoning ordinance prevents any reasonable use of land, the ordinance is unconstitutional. See Marsh, *Constitutional Law*, *supra* at 139. The court in *Pitts v. Mills*, 333 N.E.2d 897 (Ind. Ct. App. 1975), found that although residents of adjacent land did not have standing as remonstrators in regard to annexation and rezoning of vacant land, they could maintain an action for declaratory judgment to challenge the annexation ordinance.

<sup>6</sup>See *Board of Tax Comm'rs v. Valparaiso Golf Club, Inc.*, 330 N.E.2d 394 (Ind. Ct. App. 1975), holding that when assessment regulations of the state board of tax commissioners do not contain regulations for a particular type of property, the board must consider all elements of just valuation set forth in IND. CODE § 6-1-33-3 (Burns 1972) [amended after this decision to IND. CODE § 6-1.1-31-6 (Burns Supp. 1976)].

<sup>7</sup>See *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785 (Ind. Ct. App. 1975), which held that a mobile home park owner may perfect a hotel keeper's lien by mere possession of a mobile home after he has provided services thereto. See Townsend, *Secured Transactions & Creditors' Rights*, *infra* at 316. In *Lake County Title Co. v. Root Enterprises, Inc.*, 339 N.E.2d 103 (Ind. Ct. App. 1975), the Third District Court of Appeals, citing IND. CODE § 32-8-3-3 (Burns 1973), held that failure to comply with

*A. The Right of a Remote Vendee To Recover  
on the Implied Warranty of Habitability of a Builder-Vendor*

In *Barnes v. Mac Brown & Co.*,<sup>9</sup> the Indiana Supreme Court reversed the Indiana Court of Appeals<sup>7</sup> and extended the builder-vendor's implied quality warranty on new homes to all subsequent owners of the home. In the hands of the subsequent owner the implied warranty now extends to "latent defects, not discoverable by a subsequent purchaser's reasonable inspection, manifesting themselves after the purchase."<sup>10</sup> The majority in this 3-2 decision seemed to characterize the problem as one governed by the laws of products liability or tort, citing as its only authority a personal injury case in which the purchaser of a second-hand farm tractor was injured because of a manufacturer's hidden defect in the tractor.<sup>11</sup> The minority viewed the interests of the appellants as having arisen from the contract for purchase between them and the first buyers, a contract in which the builder-vendor had no interest; thus, lack of privity would be a complete defense for the builder-vendor.

Only four years ago the Indiana Supreme Court, in *Theis v. Heuer*,<sup>12</sup> established that a builder-vendor has some quality obligations with respect to new housing which he produces or markets. Those obligations are referred to as implied warranties of habit-

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statutory requirements in filing a mechanic's lien is tantamount to waiver of the rights provided to subcontractors by the mechanic's lien statutes. Following such waiver, a subcontractor who has not contracted directly with the owner has no rights against the owner if he has paid the general contractor. *See also* *Van Wells v. Stanray Corp.*, 341 N.E.2d 198 (Ind. Ct. App. 1976), in which the court enumerated the elements a materialman must prove to perfect a lien on the premises. He must prove that the material was delivered to the owner's job site, was intended to be used in the building, was actually incorporated in the building, and proper lien notice was filed. The court held that actual incorporation in the building may be proved either through estoppel of denial by the owner or through presumption arising on delivery of the materials to the job site. This case is also discussed in Townsend, *Secured Transactions & Creditors' Rights*, *infra* at 323.

<sup>9</sup>342 N.E.2d 619 (Ind. 1976).

<sup>7</sup>323 N.E.2d 671 (Ind. Ct. App. 1975). *See* Bepko, *Contracts and Commercial Law, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 132, 141 (1975).

<sup>10</sup>342 N.E.2d at 621.

<sup>11</sup>J.I. Case Co. v. Sandefur, 245 Ind. 213, 197 N.E.2d 519 (1964), *cited at* 342 N.E.2d at 620.

<sup>12</sup>280 N.E.2d 300 (1972), *aff'g* 149 Ind. App. 52, 270 N.E.2d 764 (1971) (adopting opinion of court of appeals). *See* Comment, *Theis v. Heuer: Implied Warranties in Sale of Housing*, 5 IND. LEGAL F. 221 (1971).



ability. *Theis v. Heuer* and other similar cases<sup>13</sup> quite naturally did not involve the question of the effect of lack of privity because the parties to the actions were the same as the parties to the contracts of sale into which the warranties were being implied.

The Indiana Supreme Court's decision in *Barnes* is clearly consistent with the approach being taken elsewhere with respect to the privity question,<sup>14</sup> but the split between the majority and minority is indicative of a general lack of agreement with respect to the theory to be employed in approaching the question. Courts have rejected the defense of lack of privity by using strict liability in tort,<sup>15</sup> negligence,<sup>16</sup> and fraud<sup>17</sup> as the theoretical basis of their decisions. Despite this lack of uniformity in reasoning, the trend is nevertheless clearly toward elimination of privity as an element in a suit for breach of implied warranty of habitability of used houses.

While the trend seems to be in favor of rejecting the need for privity, a few jurisdictions retain the privity requirement.<sup>18</sup> Most of the judicial statements that lack of privity is a good defense, however, are either dicta or are not supported by the facts of the cases in which they appear. One case which imposed liability on a builder-vendor in an action by his immediate vendee included dictum which seemed to indicate that only the first purchaser could recover.<sup>19</sup> Decisions based on unsupportive facts include suits by a subsequent vendee against an intervening vendor who purchased directly from the builder for resale.<sup>20</sup>

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<sup>13</sup>*E.g.*, *Wawak v. Stewart*, 247 Ark. 1093, 449 S.W.2d 922 (1970); *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965).

<sup>14</sup>*E.g.*, *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1962); *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960); *MacPherson v. Buick Motors Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>15</sup>*E.g.*, *Kriegler v. Eichler Homes, Inc.*, 269 Cal. App. 2d 224, 74 Cal. Rptr. 749 (1969).

<sup>16</sup>*E.g.*, *Steinberg v. Coda Roberson Constr. Co.*, 79 N.M. 123, 440 P.2d 798 (1968).

<sup>17</sup>*E.g.*, *Belote v. Memphis Dev. Co.*, 208 Tenn. 434, 346 S.W.2d 441 (1961).

<sup>18</sup>See notes 19-22 *infra*.

<sup>19</sup>*Leffler v. Banks*, 251 Ark. 277, 472 S.W.2d 110 (1971): "[W]e adopted the modern rule by which an implied warranty may be recognized in the *first sale* of a new house by a seller who was also the builder." *Id.* at 277, 472 S.W.2d at 111 (emphasis added). See also *Smith v. Old Warson Dev. Co.*, 479 S.W.2d 795 (Mo. 1972): "This appeal presents squarely the question of whether implied warranties of merchantable quality and fitness exist in the purchase of a *new* home by the *first purchaser* from a vendor-builder. We hold such warranties do exist." *Id.* at 796 (emphasis added).

<sup>20</sup>*H.B. Bolas Enterprises, Inc. v. Zorlingo*, 156 Colo. 530, 400 P.2d 447 (1965); *Utz v. Moss*, 31 Colo. App. 475, 503 P.2d 365 (1972).



There are two states, however, where the position taken by the dissent in *Barnes* is accepted. In Mississippi, a second purchaser was not allowed to recover, but it is unclear whether the court was sustaining a defense of lack of privity or simply rejecting creation of an implied warranty of habitability.<sup>21</sup> In Maryland, by statute, lack of privity is clearly a defense.<sup>22</sup> The Maryland statute is interesting, however, because as the act was originally introduced it provided the opposite result.<sup>23</sup>

Extension of the implied warranty of habitability to subsequent purchasers has the effect of increasing the magnitude of the risk, the uncertainty of the type of risks, and the time within which these risks may result in loss and/or litigation for the builder-vendor. The courts have, in the past, seemed to incorporate the fears aroused by these risks in members of the building community as a policy argument in favor of restricting the extension of liability contemplated in *Barnes*.<sup>24</sup> Such an argument loses sight, however, of existing ten and fifteen-year statutes of limitation<sup>25</sup> and the fact that the implied warranties of *Theis v. Heuer* remain enforceable by the original vendee if he chooses not to sell to a subsequent vendee. These same issues have been raised in cases involving the sale of personal property, and in those cases the defense of lack of privity had, until recently, been more successful. While such defense was long ago abandoned in situations in which a defectively manufactured product caused personal injury or property damage,<sup>26</sup> it has prevailed until very recently when the injury complained of is mere economic loss of bargain by a sub-vendee.<sup>27</sup> As the dissent pointed out in *Barnes*, because the defendant builder-vendor did not participate in the bargaining, there is a feeling that he should not be held responsible for economic loss to the subsequent buyer.<sup>28</sup> In fact, the drafters of the Uniform Commercial Code elected to leave the question of privity to be

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<sup>21</sup>*Oliver v. City Builders, Inc.* 303 So. 2d 466 (Miss. 1974).

<sup>22</sup>MD. REAL PROP. CODE ANN. §§ 10-201 to 10-205 (1974).

<sup>23</sup>1970 Md. Laws, ch. 151 (1970).

<sup>24</sup>This argument, contending that the builder would be in the position of an insurer with respect to personal injuries occurring in all houses he erected, was suggested by the defendant in *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 214 (1965).

<sup>25</sup>IND. CODE § 34-4-20-2 (Burns Supp. 1976), establishes a 10-year limitation for those who design, plan, supervise, or observe construction. *Id.* § 34-1-2-3 (Burns 1973) provides a 15-year limit on all actions not otherwise barred.

<sup>26</sup>*MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916); Prosser, *The Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

<sup>27</sup>*See, e.g., Lang v. General Motors Corp.*, 136 N.W.2d 805 (N.D. 1965); *Hoskins v. Jackson Grain Co.*, 63 So. 2d 514 (Fla. 1953).

<sup>28</sup>342 N.E.2d at 621.

determined by the law of the various states adopting the Code.<sup>29</sup> Indiana has adopted the most restrictive of the three provisions suggested in the Code, limiting the third party beneficiary class for sellers' warranties to the buyer's family, household, and guests.<sup>30</sup>

A growing minority of states have adopted the broader alternatives, which expand liability of builder-vendors beyond that contemplated by section 402A of the *Restatement (Second) of Torts*.<sup>31</sup>

Inasmuch as the need for privity has been rejected in the law of products liability and placed in doubt in the law of personal property sales, it is not surprising that it should also be rejected by the courts when the suit involves the sale of real property. The decision of the Indiana Supreme Court was therefore a sound and welcome advance in the law of real property.

### B. Landlord and Tenant Relationships

Several cases decided this year by the Indiana courts involving landlord and tenant relations marked changes in Indiana law.

In *Hirsh v. Merchants National Bank & Trust Co.*,<sup>32</sup> the court held in part that the landlord was required to make diligent efforts to relet the premises in mitigation of damages upon abandonment by the lessee. Unfortunately, the only authority cited was *Carpenter v. Wisniewski*,<sup>33</sup> a case in which the obligation of the landlord to mitigate was imposed by the lease. Actually, case law in Indiana prior to this decision was to the effect that the landlord has no such obligation;<sup>34</sup> however, this holding quite clearly follows the modern trend of the law.<sup>35</sup>

Another interesting aspect of the *Hirsch* decision was the court's discussion of the burden of proof. In *Carpenter* the court placed the burden of proof of mitigation of damages on the landlord because the lease required the landlord to relet the premises

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<sup>29</sup>U.C.C. § 2-318, Comment 3.

<sup>30</sup>IND. CODE § 26-1-2-318 (Burns 1974).

<sup>31</sup>J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 11-3, at 331 n.15 (1972).

<sup>32</sup>336 N.E.2d 833 (Ind. Ct. App. 1975).

<sup>33</sup>139 Ind. App. 325, 215 N.E.2d 882 (1966).

<sup>34</sup>*Patterson v. Emerick*, 21 Ind. App. 614, 52 N.E. 1012 (1899); *Aberdeen Coal & Mining Co. v. City of Evansville*, 14 Ind. App. 621, 43 N.E. 316 (1895).

<sup>35</sup>See *LaVasque v. Beeson*, 164 Ark. 95, 261 S.W. 49 (1924); *Wohl v. Yelen*, 22 Ill. App. 2d 455, 161 N.E.2d 339 (1959); *Friedman v. Colonial Oil Co.*, 236 Iowa 140, 18 N.W.2d 196 (1945); *Marmont v. Axe*, 135 Kan. 368, 10 P.2d 826 (1932); *System Terminal Corp. v. Cornelison*, 364 P.2d 91 (Wyo. 1961). See also Note, *A Lessor's Duty to Mitigate Damages*, 17 Wyo. L.J. 256 (1963).

upon abandonment by the tenant.<sup>36</sup> In the *Hirsch* case, however, citing *Miller v. Long*<sup>37</sup> and *Mug v. Ostendorf*,<sup>38</sup> the court held that such burden was on the tenant when the lease did not require the landlord to relet.

Having decided that the landlord has a duty to mitigate, the court examined the effect of repossession by the landlord. Such an act must be viewed in a different perspective in a system which requires the landlord to mitigate his damages than in one which does not require mitigation. In an era in which the landlord was *not required* to mitigate damages, older cases evolved the "surrender by operation of law" doctrine, according to which mere repossession of the abandoned leased premises could terminate the liability of the absconding tenant under the lease.<sup>39</sup> It would be unfair, however, to hold that although the landlord is required to relet he can only do so at the risk of relinquishing all rights to recover from the breaching tenant. The court was therefore quite correct when it held: "Merchants had a valid right to take possession and thereby mitigate damages as was their obligation under the law."<sup>40</sup>

This issue was before the same court again in *State v. Boyle*,<sup>41</sup> in which the court adhered to its decision that the landlord by taking possession to mitigate damages does not effect a surrender by operation of law. The *Boyle* case also involved the question of who has the duty to repair when the commercial lease is silent on the subject. It was contended by the lessee that the landlord has an implied duty to repair. The court did not find it necessary to decide this issue, however, because it found that even if there were such a duty the record did not indicate that there were facts sufficient to constitute a breach of that duty.<sup>42</sup>

*Pilotte v. Brummett*<sup>43</sup> was a landlord and tenant case with an interesting procedural question. In that case the landlord brought suit for possession prior to expiration of the lease. By the time of the trial the lease had expired, however, and judgment was given for the landlord. The court of appeals affirmed, holding that the

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<sup>36</sup>139 Ind. App. at 327, 215 N.E.2d at 884.

<sup>37</sup>126 Ind. App. 482, 131 N.E.2d 348 (1956) (involving an award of special damages in an action for conversion of personal property).

<sup>38</sup>49 Ind. App. 71, 96 N.E. 780 (1911) (involving a breach of contract to make a will in which the plaintiff proved and was awarded damages in excess of the contract when defendant failed to show why the higher award was not justified).

<sup>39</sup>See, e.g., *Terstegge v. First German Mut. Benev. Soc.*, 92 Ind. 82 (1883).

<sup>40</sup>336 N.E.2d at 837.

<sup>41</sup>344 N.E.2d 302 (Ind. Ct. App. 1976).

<sup>42</sup>*Id.* at 304.

<sup>43</sup>332 N.E.2d 834 (Ind. Ct. App. 1975).

defendant had waived the question by failing to plead prematurity in the trial court.

The Second District Indiana Court of Appeals delivered a 2-1 decision in *Old Town Development Co. v. Langford*<sup>44</sup> which should have a considerable impact on the law relating to the landlord and tenant relationship in Indiana. The primary opinion by Judge Buchanan takes a fundamentally different approach to that relationship than has heretofore been taken by Indiana courts.

Heretofore, Indiana has viewed the landlord and tenant relationship in the traditional manner, deeming the transaction between them primarily as a conveyance of property. The Buchanan opinion, on the other hand, consistent with a growing number of authorities,<sup>45</sup> views the transaction as a contract to furnish a housing package to the tenant.<sup>46</sup> Substantially different results obtain under the two theories. Under the conveyance approach, the tenant was regarded as the owner and as such was responsible for the condition of the premises; therefore, the landlord undertook no implied obligations with respect to the quality of the premises either at the beginning of the term<sup>47</sup> or thereafter, and the duty to repair was placed upon the lessee.<sup>48</sup> Except for concealed conditions, the landlord was not liable for injuries suffered by the tenant or third persons which resulted from defects in the leased premises.<sup>49</sup> Under the contract approach, on the other hand, the landlord has an obligation to furnish habitable housing at the beginning of the term and a duty to keep it habitable.<sup>50</sup> When this duty is breached the landlord may be required to respond in damages for injuries caused to the tenant or third persons.<sup>51</sup>

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<sup>44</sup>349 N.E.2d 744 (Ind. Ct. App. 1976). A petition to transfer has been filed in this case, and the Indiana Supreme Court may choose to rule on this important area of the law.

<sup>45</sup>See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill. 2d 351, 280 N.E.2d 208 (1972).

<sup>46</sup>349 N.E.2d at 764.

<sup>47</sup>*Anderson Drive-In Theatre, Inc. v. Kirkpatrick*, 123 Ind. App. 388, 110 N.E.2d 506 (1953).

<sup>48</sup>*Stover v. Fechtman*, 140 Ind. App. 62, 222 N.E.2d 281 (1966); *Barman v. Spencer*, 49 N.E. 9 (Ind. 1898).

<sup>49</sup>*Hunter v. Cook*, 149 Ind. App. 657, 274 N.E.2d 550 (1971); *Stover v. Fechtman*, 140 Ind. App. 62, 222 N.E.2d 281 (1966); *Guenther v. Jackson*, 79 Ind. App. 127, 137 N.E. 582 (1922).

<sup>50</sup>*Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970); *Sargent v. Ross*, 113 N.H. 388, 308 A.2d 528 (1973).

<sup>51</sup>It has not always been held that the landlord is liable for personal injuries which may result from a breach of a contractual duty to repair. Rather, damages in such a case have been limited to the cost of repair. For a discussion of this issue, see *Faber v. Creswick*, 31 N.J. 234, 156 A.2d 252 (1959). Damage limitations inherent in the doctrine of *Hadley v. Baxendale*, 9 Exch. 341 (1854), seem to be relied on in such holdings. Judge Buchanan

In the *Old Town* case, the tenant's wife and children were killed and the tenant was injured when a fire swept the leased apartment. There was evidence to show that the fire was caused by the furnace flue having been installed too close to combustible floor joists at the time of original construction, approximately twenty months before the fire. The liability of the landlord was asserted on the basis of negligence, an implied warranty of habitability arising from the lease, strict liability in tort similar to that which has been imposed in products liability cases, and *res ipsa loquitur*. It was in this context, then, that Judge Buchanan adopted a contract approach to the landlord and tenant relationship, and the court affirmed a judgment in favor of the tenant in excess of one-half million dollars.

The court held that there was evidence sufficient to find the defendant liable for personal injury and property damage on three theories: negligence,<sup>52</sup> *res ipsa loquitur*,<sup>53</sup> and breach of implied warranty of habitability;<sup>54</sup> however, the court refused to extend strict liability in tort to the defendant.<sup>55</sup> The first two theories were supported by evidence of improper initial construction, improper inspections during construction, and exclusive control by the landlord of the defective heating system since construction.

In holding the defendant liable for breach of an implied warranty of habitability the court made several significant holdings. These include a finding that residential leases are contracts<sup>56</sup> and that such contracts contain a "bifurcated" implied warranty of habitability. One part of this warranty is similar to the implied warranties of merchantability and fitness for a particular purpose of the Uniform Commercial Code,<sup>57</sup> and warrants freedom from latent defects causing the premises to be uninhabitable. The other part of the warranty is a promise to maintain the premises in habitable condition.<sup>58</sup> The court also held that the landlord must receive notice of a defect and be allowed a reasonable opportunity

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notes, however, that the *Hadley v. Baxendale* doctrine has recently been extended to include such consequential damages as personal injuries. 349 N.E.2d at 761.

<sup>52</sup>*Id.* at 781.

<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 774.

<sup>55</sup>*Id.* at 769-72. The court held that a jury instruction applying a standard of strict liability in tort was harmless error, as the verdict was supported by evidence of breach of implied warranty and of negligence.

<sup>56</sup>*Id.* at 764. The court found that a lease, contractual in nature, gives rise to the full range of breach of contract remedies.

<sup>57</sup>*Id.* at 776. The lessor warrants that the leasehold is fit for residential purposes. U.C.C. §§ 2-314, 2-315.

<sup>58</sup>349 N.E.2d at 764.

to repair, that a defect which is latent is a breach of an implied warranty of freedom from latent defects, and that the notice requirement for such a breach is "minimal"; notice will be presumed where the landlord was also the builder. The decision also establishes that breach of the warranty will subject the landlord to liability (1) for damages "for breach of contract . . . including any consequential damages . . ." and (2) "for personal injury and personal property damage in tort . . .".<sup>59</sup> The court did, however, stop short of extending strict liability in tort, as represented by the *Restatement (Second) of Torts* section 402A, to residential landlords or applying this new implied warranty of habitability to landlords who had no substantial connection with the defect at the time of construction.<sup>60</sup>

In a concurring opinion, Judge Sullivan stated that he could see no justification for not extending section 402A principles to this case, inasmuch as the constructive notice found by Judge Buchanan converted the implied warranty theory into one of strict liability. Judge Sullivan's opinion may also fairly be read as authority for not imposing strict liability upon a mere residential landlord who had no connection with the creation of the latent defect.<sup>61</sup>

In view of the lack of consensus among the three judges, it is possible to construe *Old Town* as imposing a form of strict liability for latent defects rendering the leased premises uninhabitable only on builder-landlords, while retaining substantial notice requirements in cases of vendee-landlords. It is apparent, therefore, that the application of the strict liability doctrine has nothing to do with the fact that a landlord is involved. It is based rather on the fact that a builder is involved in one case and not in the other. Where a builder is involved, strict liability is applied. Where a mere landlord is involved, negligence continues to be the basis for finding liability. It would seem, then, that whether the apartment builder keeps and manages the complex himself, or sells it to another, would have no bearing on his liability should an injury thereafter occur as a result of a construction defect. In either case, he is being held strictly liable as the manufacturer of a product. The only part of the equation that changes when he sells the complex is that he has now destroyed the privity of contract which would otherwise have existed between him and the apartment dweller and it seems that *Barnes v. Mac Brown* would render that fact immaterial.

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<sup>59</sup>*Id.* at 765.

<sup>60</sup>Dissimilarities between the sellers of defective goods contemplated by § 402A and the residential lessor were observed, and a need for judicial and legislative action on this issue was noted. *Id.* at 776-79.

<sup>61</sup>*Id.* at 790-93.

*C. Liability for Interference with the  
Flow of Surface Waters*

In *Gene B. Glick Co. v. Marion Construction Corp.*<sup>62</sup> the Indiana Court of Appeals considered the problem of increased discharge of surface waters upon a lower watershed owner as a result of subdivision of the upper watershed land. The case was factually interesting because, while the creek which provided drainage to both the upper and lower watershed properties originated on the lower land, there was no natural channel carrying the water from the upper land to the creek. Therefore, prior to development of the upper land, storm waters drained to the lower land simply as diffused surface water. In developing a subdivision, the owner of the upper land constructed storm sewers and ditches thereon and channelled the surface drainage toward the lower land. Thereupon, the upper land owner trespassed onto the lower property and dug a ditch carrying the water from the storm sewers and ditches to the creek. The defendant upper owner would therefore have been liable as a trespasser quite apart from the law in relation to surface waters, but only the latter issue was dealt with at length by the court of appeals. In discussing the liability of the appellant the court reflected the confusion that has characterized cases in Indiana and elsewhere concerning the rights of adjoining landowners with respect to diffused surface waters. Three different approaches to the problem have been taken by the courts of this country: (1) the "common enemy" or common law, (2) the civil law, and (3) the reasonable user approach.<sup>63</sup> In a leading law review article on the subject Indiana was placed among the "common enemy" group.<sup>64</sup> In purest form the "common enemy" approach holds that surface owners may do anything they wish to combat the surface waters without incurring liability to anyone injured thereby.<sup>65</sup> At the other extreme, the civil law doctrine

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<sup>62</sup>331 N.E.2d 26 (Ind. Ct. App. 1975).

<sup>63</sup>See Kenyon & McClure, *Interference With Surface Waters*, 24 MINN. L. REV. 891 (1940) and cases cited therein.

<sup>64</sup>*Id.* at 903.

<sup>65</sup>See, e.g., *Cairo & Vin. R.R. Co. v. Stevens*, 73 Ind. 278 (1881):

Dillon, in his work on Municipal Corporations, speaking of the surface water, says: "This the law very largely regards (as Lord Tenterden phrases it) as a common enemy, which every proprietor may fight or get rid of as best he may. . . . On the other hand, the owner of the property may take such measures as he deems expedient to keep surface water off from him or turn it away from his premises on to the street; and, on the other hand, the municipal authorities may exercise their powers in respect to graduation, improvement, and repair



provides that anyone who interferes in any way with the natural flow of water is liable to any other landowner who suffers damage as a result thereof.<sup>66</sup> The reasonable user approach would impose liability only for an unreasonable interference with, or increase in, the flow of surface waters.<sup>67</sup>

Some early Indiana cases which adopted the "common enemy" approach did so on facts which are consistent with that doctrine;<sup>68</sup> however, such cases all involved obstructions to the flow of surface water constructed by a lower watershed owner. When the court was first faced with the converse of the obstruction, i.e., building ditches and drains by the upper owner to concentrate and increase the flow of surface water, however, it expressly adopted the civil law doctrine without seeming to recognize that Indiana had adopted the common enemy approach in prior cases. The confusion that has resulted is illustrated by a paragraph in *Indiana Law Encyclopedia* which is quoted in the principal case and which states, in effect, all three of the rules in regard to surface waters,<sup>69</sup> without recognizing the three are inconsistent.

The court had an excellent opportunity to adopt the more sensible "reasonable user" approach inasmuch as the case also involved an ordinance of the Metropolitan Planning Commission

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of streets, without being liable for the consequential damages caused by surface water to adjacent property."

*Id.* at 281.

<sup>66</sup>*See, e.g.,* Templeton v. Voshloe, 72 Ind. 134 (1880), in which the court quoted approvingly from an authority expressing the civil law approach:

Before proceeding to consider the law as to water percolating through the earth, beneath its surface, it is necessary to refer to a few principles which seem now to be pretty well settled as to the respective rights of adjacent land-owners, in respect to waters which fall in rain, or are in any way found upon the surface, but not embraced under the head of streams or watercourses, nor constituting permanent bodies of water, like ponds, lakes, and the like. It may be stated as a general principle, that, by civil law, where the situation of two adjoining fields is such that the water falling or collected by melting snows, and the like, upon one, naturally descends upon the other, it must be suffered by the lower one to be discharged upon his land if desired by the owner of the upper field. But the latter can not, by artificial trenches, or otherwise, cause the natural mode of its being discharged, to be changed to the injury of the lower field, as by conducting it by new channels in unusual quantities on to particular parts of the lower field.

*Id.* at 136.

<sup>67</sup>*See, e.g.,* City of Franklin v. Durgee, 71 N.H. 186, 51 Atl. 911 (1901).

<sup>68</sup>*Clay v. Pittsburgh, C.C. & St. L. Ry.*, 164 Ind. 439, 73 N.E. 904 (1905); *Cairo & Vin. Ry. v. Stevens*, 73 Ind. 278 (1881); *Taylor v. Fickas*, 64 Ind. 167 (1878).

<sup>69</sup>The court cites 29 INDIANA LEGAL ENCYCLOPEDIA *Water* 53 (1960). 331 N.E.2d at 31.



which imposed a duty on the lower land owner to provide for safe handling of prospective surface drainage from the upper land at the time of development of the lower land.<sup>70</sup> The court held, however, that the ordinance was not intended to change the common law and, consistent with prior Indiana authority, that an upper land owner is liable for damage caused a lower land owner by an increase in the flow of surface waters onto the lower land as a result of the construction of ditches and drains on the upper land.

*D. Survivorship Rights in Personal Property  
Held by Joint Tenants*

Three major events involving survivorship rights occurred in Indiana since the last Survey of Recent Developments in Indiana Law. First, the Indiana Supreme Court affirmed the decision of the Third District Indiana Court of Appeals<sup>71</sup> and adopted the lower court's opinion in the landmark case of *In re Estate of Fanning*,<sup>72</sup> which stated that certificates of deposit belong to the surviving donee co-owner because such certificates are in reality third-party donee beneficiary contracts. Second, the Second District Indiana Court of Appeals was called upon to apply the *Fanning* doctrine in *Robison v. Fickle*,<sup>73</sup> a case involving survivorship rights, not only in certificates of deposit, but also in corporate stock and a joint savings account. Third, the Indiana General Assembly enacted legislation, effective January 1, 1977, setting forth the rights of various parties in and to funds deposited in multiple-party accounts in financial institutions.<sup>74</sup> The new law should greatly reduce the uncertainties with respect to joint accounts which have resulted in such litigation as *Fanning* and *Robison*.

Initially, it should be noted that the new law affects only accounts in financial institutions, including certificates of deposit, and no other property. The new law provides that, in the case of multi-party accounts, during the lifetime of all the parties the account funds are deemed to be owned in the same proportion as the net contributions to the account by the parties; however, upon the death of a party all funds belong to the survivor or survivors.<sup>75</sup> In addition to a requirement that "clear and convincing evidence" be admitted to prove an intent different from the result set forth

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<sup>70</sup>*Id.* at 30.

<sup>71</sup>315 N.E.2d 718 (Ind. App. 1974), discussed in *Property, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 294 (1975).

<sup>72</sup>333 N.E.2d 80 (Ind. 1975).

<sup>73</sup>340 N.E.2d 824 (Ind. App. 1976).

<sup>74</sup>IND. CODE §§ 32-4-1.5-1 to -15 (Burns Supp. 1976).

<sup>75</sup>*Id.* §§ 32-4-1.5-1 to -4.

above,<sup>76</sup> the new law also provides a presumption that all joint accounts are intended to have the survivorship characteristics set forth in the statute.<sup>77</sup> In keeping with the apparent intent of the courts in *Fanning* and *Robison*, the Act specifically allows such accounts as exceptions to the wills statutes;<sup>78</sup> however, donee-beneficiaries are not allowed to retain the funds as against the "claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children," to the extent of the donee-beneficiary's gain and the insufficiency of estate assets.<sup>79</sup>

## **XVI. Secured Transactions and Creditors' Rights**

*R. Bruce Townsend\**

### *A. Recording Statutes: Recording Contracts Affecting Persons Tapping into Municipal Sewers*

Legislation permits owners and developers of land outside a municipality to connect to municipal sewers by contract binding the owners and their successors to pay a fair pro rata share of the cost of the sewer when they tap into the line.<sup>1</sup> This statute requires that the contract include a provision binding owners and their successors to an agreement not to remonstrate against annexation. However, an owner will not be bound unless the contract is recorded in the real estate records before he taps into the line.<sup>2</sup>

A recent Indiana Court of Appeals decision<sup>3</sup> holds that recording of a contract between the municipality and the developer's contractor (who was not a record owner of the land) is ineffective

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<sup>76</sup>*Id.* §§ 32-4-1.5-3(a) and -4(a).

<sup>77</sup>*Id.* § 32-4-1.5-1(4) provides that "joint account" means an account payable on request to one or more of two or more parties, whether or not mention is made of any right of survivorship.

<sup>78</sup>*Id.* §§ 32-4-1.5-6 and -14.

<sup>79</sup>*Id.* § 32-4-1.5-7.

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<sup>1</sup>IND. CODE § 19-2-7-16 (Burns 1974).

<sup>2</sup>*Id.* Such recorded contracts will bind owners and their successors. *Doan v. City of Fort Wayne*, 253 Ind. 131, 252 N.E.2d 415 (1969).

<sup>3</sup>*Residents of Green Springs Valley Subdivision v. Town of Newburgh*, 344 N.E.2d 312 (Ind. Ct. App. 1976).

as constructive notice to bind purchasers from the original developer who had tapped into the sewer unless the contract was recorded within the purchaser's chain of title. The original owner of the land was a developer who contracted with his contractor for construction in his development of a sewer which was to be attached to the municipal sewer system. The contract waived the right to remonstrate by the developer, his successors, and all owners who tapped into the sewer. The contractor then contracted with the municipality to hook on to the latter's sewer and this second contract also required all owners who tapped into the sewer to waive the right to remonstrate. The second contract, which identified and described the developer and the property to be serviced by the sewer, was recorded. Based upon the conflicting testimony of title lawyers<sup>4</sup> as to whether or not the recorded contract was linked to the record owners of the land (in this case the developer), summary judgment in the court below was reversed. The First District Court of Appeals held that a material issue of fact existed as to whether purchasers from the developer who had tapped into the sewer after the contract was recorded were charged with constructive notice of, and bound by, the waiver found in the contract. The case was sent back for trial to determine whether the recorded contract was within the record chain of title through which the remonstrators claimed.

The opinion follows established law to the effect that transfers by persons outside the record chain of title (before they acquire record title, or after they have disposed of title on record) are not constructive notice to subsequent purchasers of the real estate.<sup>5</sup> However, the court rejected application in this situation of equally clear law that purchasers claiming the right to use an unrecorded easement or other interest in land (in this case the interest would have been a sewer easement) are charged with all limitations upon that interest which inquiry to the servient owner (in this case the municipality) would have disclosed.<sup>6</sup> Like

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<sup>4</sup>On the admission of expert testimony about the effect of recordation, the case was clearly in error. When an instrument in unrecordable form is spread of record, it is not constructive notice to purchasers. *See, e.g., Bledsoe v. Ross*, 59 Ind. App. 609, 109 N.E. 53 (1915).

<sup>5</sup>*Sinclair v. Gunzenhauser*, 179 Ind. 78, 98 N.E. 37 (1912); *Corbin v. Sullivan*, 47 Ind. 356 (1874).

<sup>6</sup>A grantee claiming under a recorded or unrecorded instrument of transfer is charged with notice of all reserved or excepted interests. *Wiseman v. Hutchinson*, 20 Ind. 40 (1863); *Larrance v. Lewis*, 51 Ind. App. 1, 98 N.E. 892 (1912) (purchaser under improperly recorded deed required to take notice of recital reserving timber in grantor). This rule applies to transferees of the dominant owner of an easement. *Spencer Stone Co. v. Sedwick*, 58 Ind.

most recording statutes, the recording provision involved in this case was silent as to the circumstances under which owners would be protected by the failure to record.<sup>7</sup> The effect of actual knowledge or notice from other sources is not considered in the statute, nor is there a provision requiring a description of the land or the names under which the contract should be indexed. The decision of the court of appeals makes it clear that the public is not charged with constructive notice of restrictions and burdens attached to the use of public sewers emanating from contracts with developers, unless the contract describing or identifying the property is recorded under the name of the record owner as of the time of recordation. It seems that a contract between a municipality and a non-record owner will not suffice unless the contract describes the property, clearly identifies the record owner as such by name, and refers to the fact that it is made pursuant to an authorizing contract with the record owner. These elements must be sufficiently stated to put a purchaser on notice that he is linked by privity through binding contracts with a record owner. The contract should be indexed under the name of the record owner or grantor. In no event should the question depend upon the varying opinions of title lawyers as to the circumstances under which the link to the record owner is sufficient.<sup>8</sup> The case indicates, however, that purchasers with actual knowledge of the contracts purporting to bind them would be bound by the waiver.

#### *B. Mortgages—Effect of Security Furnished by Third Party*

A mortgagee or secured party may obtain as original or additional security a security interest in the property of a third party who, in effect, becomes a surety to the extent of the collateral furnished to secure the debtor's obligation.<sup>9</sup> A novel illustration of this rule was presented by *American Savings & Loan Association v. Hoosier State Bank*.<sup>10</sup> There, because the mortgagors had an insufficient down payment, the mortgagee took an assignment of a savings account owned by a third party as additional security

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App. 64, 105 N.E. 525 (1914). Cf. *Selvia v. Reitmeyer*, 295 N.E.2d 869 (Ind. Ct. App. 1973).

<sup>7</sup>IND. CODE § 19-2-7-16 (Burns 1974).

<sup>8</sup>See note 4 *supra*.

<sup>9</sup>See, e.g., *Owen County State Bank v. Guard*, 217 Ind. 75, 26 N.E.2d 395 (1940) (wife furnished a certificate of deposit as security for a loan to the husband's corporation; as surety, she was released by failure of bank to exercise setoff); *Damler v. Baine*, 114 Ind. App. 534, 51 N.E.2d 885 (1943) (stock of a third party was pledged as security for principal; when it was sold, the third party as surety recovered reimbursement from the principal).

<sup>10</sup>337 N.E.2d 486 (Ind. Ct. App. 1975).

for a loan. In a foreclosure action upon the mortgage, the third party sought recovery of the savings account based upon the condition that it should not be subject to withdrawal until the mortgage was reduced below a certain amount. Because conflicting evidence was produced as to whether payments had reduced the loan below the specified amount, a finding in favor of the third party was upheld.

### C. Foreclosure Procedures—Real Estate

#### 1. Mortgage Foreclosure

On judicial foreclosure a debtor who has given a lien or mortgage upon real estate is allowed a statutory period of redemption. He is permitted to continue in possession and foreclosure sale is forbidden until a period of time after the filing of the complaint for foreclosure.<sup>11</sup> For mortgages executed after July 1, 1975, the period is three months; for non-mortgage liens and for mortgages executed after January 1, 1958, the period is six months; other periods are fixed by statute for mortgages executed on prior dates.<sup>12</sup> Suppose that the court with jurisdiction in a foreclosure action orders a sale and it is held before the period of redemption has expired. After the time for appeal has passed, may the order or the sale be challenged? *Indiana Suburban Sewers, Inc. v. Hanson*<sup>13</sup> properly held that this is a collateral attack on the judgment. The order or a sale under it may be challenged only on grounds enumerated in Trial Rule 60(B).<sup>14</sup>

An interesting problem sometimes arises as to what interest of a debtor and other owners is acquired by the purchaser upon a foreclosure or at a tax or judicial sale. Although the doctrine of

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<sup>11</sup>IND. CODE § 32-8-16-1 (Burns Supp. 1976); IND. R. TR. P. 69(A), (C). Trial Rule 69(A) is applicable only to enforcement of judgments which were not secured by lien prior to judgment. The rule allows a six-month redemption period from the time a judgment or decree becomes a lien upon real estate. Trial Rule 69(C) makes procedures for foreclosure of all liens on real estate subject to the rules governing foreclosure of mortgages. The intent was to make redemption periods allowed in the case of mortgage foreclosures applicable to other lien foreclosures and to adopt a similar rule for executions on real estate.

<sup>12</sup>Mortgages executed prior to January 1, 1958, are subject to a one-year redemption period. IND. CODE § 32-8-16-1 (Burns Supp. 1976). For a discussion of the unsatisfactory amendment to this law enacted in 1975, see Townsend, *Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305, 309-11 (1975).

<sup>13</sup>334 N.E.2d 720 (Ind. Ct. App. 1975).

<sup>14</sup>IND. R. TR. P. 60(B) provides special circumstances for relief from a final judgment or order.

caveat emptor applies in the case of most forced sales,<sup>15</sup> several Indiana decisions hold that the burdens and rights under restrictive covenants pass to the purchaser at the sale.<sup>16</sup> In *Indiana Suburban Sewers, Inc. v. Hanson*,<sup>17</sup> the court held that the purchaser at a foreclosure sale became the owner of the public utility's certificate of authority as well as its physical property, notwithstanding the fact that the buyer was not qualified to exercise the certificate. In *Budnick v. Indiana National Bank*,<sup>18</sup> a tax sale of land upon which a pipeline easement was located did not pass the title free of the encumbrance, even though the pipeline was taxed separately. However, it was held that the buyer at the tax sale acquired rights to a payment due under the recorded easement for a second pipeline which had been laid over the easement after the tax lien attached, even though the taxpayers had previously been paid. Public utilities acquiring easement rights thus must make certain that the acquisition price is applied first to tax liens before the funds are paid over to the servient owner.<sup>19</sup>

## 2. Conditional Sales Contracts

In light of *Skendzel v. Marshall*,<sup>20</sup> it is now clearly established that when a vendee in possession of the property has obligated himself under a conditional land sales contract to pay the purchase price in installments, the vendor cannot declare a forfeiture upon

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<sup>15</sup>*Parker v. Rodman*, 84 Ind. 256 (1882) (mortgagor's warranty of title did not extend to stranger who purchased). If there is a total failure of title, the purchaser is subrogated to the rights of the lienholder or creditor who is paid from the proceeds of the sale. *Weaver v. Guyer*, 59 Ind. 195 (1877). See IND. CODE § 34-1-67-4 (Burns 1973).

<sup>16</sup>*Lake Erie & W.R.R. v. Priest*, 131 Ind. 413, 31 N.E. 77 (1891) (purchaser bound by covenant to maintain fence); *Midland Ry. v. Fisher*, 125 Ind. 19, 24 N.E. 756 (1890) (purchaser bound to build fence); *Hickam v. Golladay*, 83 Ind. App. 569, 149 N.E. 375 (1925) (reservation of right of way on foreclosed property is preserved to mortgagor).

<sup>17</sup>334 N.E.2d 720 (Ind. Ct. App. 1975).

<sup>18</sup>333 N.E.2d 131 (Ind. Ct. App. 1975).

<sup>19</sup>It seems, therefore, that from the time of payment the easement becomes taxable to the utility, and the taxable value to the servient owner is reduced. In this connection, see *Board of Comm'rs v. Midwest Associates, Inc.*, 253 Ind. 551, 255 N.E.2d 807 (1970), holding that the interest of a vendee under a contract to purchase land from an owner not subject to taxation (the United States) is taxable.

<sup>20</sup>261 Ind. 226, 301 N.E.2d 641 (1973), *cert. denied*, 415 U.S. 921 (1974). See also *Townsend, Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 236-39 (1974). On writ of mandate, the Indiana Supreme Court in this case upheld the final decree of the lower court which on remand allowed the vendors their claim for payment of delinquent taxes and a \$1,000 attorney fee. 330 N.E.2d 747 (Ind. 1975).

default, notwithstanding a provision in the contract giving him that right. Ordinarily, the vendor must proceed by judicial foreclosure. This principle was acknowledged if not applied in *Pierce v. Yochum*,<sup>21</sup> in which a contract buyer's default upon annual payments for a farm led the vendor to seek ejectment and damages. The court upheld a "negative judgment" and refused to permit foreclosure for the vendors because delinquent payment of installments and taxes (grounds under the contract for default at the option of the vendor) previously had been accepted. Vendor's conduct constituted a waiver of the option until such time as the vendee was given notice of vendor's intent to declare a default unless delinquencies were made up within a reasonable time. In *Pierce* such notice had not been given.<sup>22</sup> Interestingly, the vendor claimed that under the following contract provision the parties' past conduct could not amount to such a waiver: "The failure of the Sellers to exercise any option herein granted them upon any given default of the Buyers shall not constitute a waiver of their rights to exercise said option or options . . . ."<sup>23</sup> The appeals court applied a literal construction to this anti-waiver provision, and held that while the vendor's acceptance of delinquent payments would not constitute a waiver of later options, it did constitute a waiver of the option to declare earlier defaults. Probably a better basis for throwing such provisions out is that, as in the case of all waivable provisions in a contract, an anti-waiver provision also may be waived.<sup>24</sup> On the other hand, in *Donaldson v. Sellmer*,<sup>25</sup> the First District Court of Appeals upheld a decree cancelling a conditional sales contract without judicial foreclosure sale in a case in which the vendee had paid approximately \$7,000 on a \$16,500 contract. The court found the vendee in default under his contract because of delinquent installments, waste totaling \$11,000, failure to acquire adequate insurance, contracting to sell the property without the written consent of the vendor, and abandonment of the property. The court also awarded the vendor an affirmative judgment based upon the difference between the \$11,000 waste and the amount paid by the vendee on the contract. If any facts would

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<sup>21</sup>330 N.E.2d 102 (Ind. Ct. App. 1975).

<sup>22</sup>See also *Universal C.I.T. Credit Corp. v. Shepler*, 329 N.E.2d 620 (Ind. Ct. App. 1975), in which acceptance of late payments as constituting waiver of the right to accelerate or declare default is considered. This case is discussed in text accompanying note 51 *infra*.

<sup>23</sup>330 N.E.2d at 110.

<sup>24</sup>Compare *Foltz v. Evans*, 113 Ind. App. 596, 613, 49 N.E.2d 358, 365 (1943) ("It is well settled that a contract stipulating that any modification must be in writing may nevertheless be modified verbally . . . ."); 17A C.J.S. *Contracts* § 377(C) (1963).

<sup>25</sup>333 N.E.2d 862 (Ind. Ct. App. 1975).



justify strict foreclosure under the qualifications recognized by the *Skendzel* case,<sup>26</sup> evidence offered in support of forfeiture in this decision would certainly qualify.

*D. Perfection of Security Interests Under the  
Uniform Commercial Code*

How does a secured party perfect a security interest in a mobile home? If a mobile home is consumer goods he may file in the county of the debtor's residence;<sup>27</sup> if it is a fixture he may file in the fixture file of the county where the land is located;<sup>28</sup> if it is inventory he may file with the Secretary of State;<sup>29</sup> and if it is a motor vehicle he may perfect on the certificate of title.<sup>30</sup> In order to be safe, the secured party may be well advised to perfect in each of these ways. The court of appeals avoided a thorough consideration of the problem in *Nicholson's Mobile Homes Sales, Inc. v. Schramm*,<sup>31</sup> in which a seller took a purchase money security interest in a number of mobile homes from a debtor who placed them in space leased in a mobile home park. By definition, property held for lease is "inventory";<sup>32</sup> thus the court determined that the secured party was required to perfect by filing a financing statement with the Secretary of State. The court failed to consider whether a mobile home is a "motor vehicle" under the Code. A lien on a "motor vehicle" must be noted on the title by a public official except in the case of "inventory held for sale."<sup>33</sup> The mobile home held for *leasing* hardly seems to be inventory held for *sale*. The court also failed to observe that the mobile home was placed upon

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<sup>26</sup>*Skendzel* limits forfeiture of land sale contracts to a few specific factual situations. Forfeiture is appropriate in the case of an abandoning absconding vendee, or when the vendee has paid only a minimal amount on the contract at the time of default and seeks to retain possession while the vendor is paying taxes, insurance and other upkeep of the premises. 261 Ind. at 240-41, 301 N.E.2d at 650.

<sup>27</sup>IND. CODE § 26-1-9-401(1)(a) (Burns 1974). If purchase money security is involved, no filing is required subject to limited protection. *Compare id.* § 26-1-9-301(1)(d) with *id.* § 26-1-9-307(2).

<sup>28</sup>*Id.* § 26-1-9-401(1)(b).

<sup>29</sup>*Id.* § 26-1-9-401(e). *Cf.* *Taylor Mobile Homes v. Founder Inv. Corp.*, 238 So. 2d 116 (Fla. App. 1970).

<sup>30</sup>IND. CODE § 26-1-9-302(3)(b), (4) (Burns 1974) (applicable "if a certificate of title is required under the statutes of this state . . .").

<sup>31</sup>330 N.E.2d 785 (Ind. Ct. App. 1975).

<sup>32</sup>IND. CODE § 26-1-9-109(4) (Burns 1974).

<sup>33</sup>*Id.* § 26-1-9-302(3)(b). The Indiana Certificate of Title law applies to "any motor vehicle, semitrailer or house car." *Id.* § 9-1-2-1 (Burns 1973). *Compare id.* § 9-1-1-2 (excluding trailers from the definition of "motor vehicle").



leased space, thus raising an issue as to whether it was a fixture.<sup>34</sup> Because of these omissions, the decision is of little aid to the mobile home financing industry. It would be wise when the vehicle is not held as inventory to perfect by local filing both as a fixture and as consumer goods, and also by official notation upon the certificate of title. Since the practice is to deal with mobile homes through the certificate of title, the industry as well as owners would be greatly benefited by a rule requiring perfection on the certificate of title.<sup>35</sup>

### E. Equipment Leases

There are advantages (and disadvantages) to the lease of equipment as distinguished from straight purchase or purchase with a security agreement securing the price.<sup>36</sup> The law governing the creation and regulation of these relationships often differs, for reasons which are technical rather than based upon analogy and sound legal reasoning.<sup>37</sup> An illustration of the advantages and disadvantages involved, as well as the technical differences in the law governing these relations, is *Angel v. Behnke*,<sup>38</sup> in which the court of appeals held that a lease of data processing and other equipment by a county was not subject to competitive bidding statutes which apply to "purchases." Examining a great body of disorganized legislation on competitive bidding, the court found

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<sup>34</sup>It has been held under pre-Code law that a mortgage on a structure added to property leased by the debtor under a lease in excess of three years is in effect a mortgage on lands. *Lincoln Nat'l Bank & Trust Co. v. Nathan*, 215 Ind. 178, 19 N.E.2d 243 (1939) (lease permitted removal of fixtures). One court found that a mobile home was a fixture. *George v. Commercial Credit Corp.*, 440 F.2d 551 (7th Cir. 1971) (mortgagee of land prevailed over trustee in bankruptcy).

<sup>35</sup>*Accord*, *In re Radny*, 12 U.C.C. REP. SERV. 583 (W.D. Mich. 1973); *In re Merrill*, 9 U.C.C. REP. SERV. 755 (D. Neb. 1971); *In re Canter*, 8 U.C.C. REP. SERV. 252 (E.D. Tenn. 1970); *Recchio v. Manufacturers & Traders Trust Co.*, 316 N.Y.S.2d 915 (App. Div. 1970).

<sup>36</sup>*Compare* *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785 (Ind. Ct. App. 1975), holding that equipment held for leasing is inventory under the Uniform Commercial Code. See IND. CODE § 26-1-9-109(4)(b) (Burns 1974), and a discussion of this case at text accompanying notes 31-35 *supra*. See also *Starke Memorial Hosp. v. Todd Equip. Leasing Co.*, 333 N.E.2d 925 (Ind. Ct. App. 1975).

<sup>37</sup>*But see* *Glenn Dick Equip. Co. v. Galey Constr., Inc.*, 541 P.2d 1184 (Idaho 1975) (applying by analogy Uniform Commercial Code provisions on warranty to the commercial lease of goods).

<sup>38</sup>337 N.E.2d 503 (Ind. Ct. App. 1975). The court held that a lease of equipment was not a "purchase" under the "bid" statute. IND. CODE § 5-17-1-1 (Burns 1974).

that since the bid statute which applies to state agencies<sup>39</sup> includes both the terms "rental" and "purchase" of equipment, use of the single term "purchase" in the statute applying to local government units indicated an intent, ephemeral to say the least, that this statute should not apply to lease of equipment without express language to that effect.

*F. Maturity and Discharge of Security Interests;  
Subordination of Security*

Two recent decisions deal with acceleration clauses of the type commonly included in security agreements and mortgages. In *Cowan v. Murphy*<sup>40</sup> an installment note provided that if any payment became due or was in default for more than forty-five days "this note in its entirety shall become immediately due and payable."<sup>41</sup> The court of appeals held that the statute of limitations began to run upon the expiration of the period after default in any installment, a result which would not have been reached had the instrument provided for optional acceleration.<sup>42</sup> The case supports the generally accepted view that acceleration clauses depending upon default or other events should be couched in language making acceleration optional at the instance of the creditor, rather than providing for ipso facto acceleration. In *Universal C.I.T. Credit Corp. v. Shepler*,<sup>43</sup> the security agreement provided for acceleration without notice or demand if the holder considered the indebtedness of the collateral "insecure." As noted below,<sup>44</sup> the court held that such a clause must be exercised in good faith and that good faith is to be determined by an objective, "reasonable man" standard, with the debtor carrying the burden of proving the secured party's bad faith.

The duty of a subordinating secured party to preserve his security for the benefit of the subordinate was recognized by the court in *Daly v. Nau*.<sup>45</sup> The secured party assigned its security

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<sup>39</sup>IND. CODE § 4-13-2-11 (Burns 1974).

<sup>40</sup>333 N.E.2d 802 (Ind. Ct. App. 1975). The court held that the statute of limitations begins to run as soon as any installment is in default for more than 45 days and acceptance of late payments does not operate as a waiver of a mandatory acceleration clause. On the issue of the possibility of waiver or estoppel based on acceptance of late payments, see text accompanying notes 21-26 *supra*. That partial payments after maturity may extend the statute of limitations, see IND. CODE § 34-1-2-12 (Burns 1973).

<sup>41</sup>333 N.E.2d at 803.

<sup>42</sup>*Huston v. Fatka*, 30 Ind. App. 693, 66 N.E. 74 (1903).

<sup>43</sup>329 N.E.2d 620 (Ind. Ct. App. 1975).

<sup>44</sup>See discussion at text accompanying note 49 *infra*.

<sup>45</sup>339 N.E.2d 71 (Ind. Ct. App. 1975).

interest in the debtor's assets to a third party after agreeing to subordinate its security to a creditor who loaned the debtor \$25,000. The court held that the creditor could recover from the secured party on a theory of interference with a contractual relation.<sup>46</sup> However, since the creditor failed to prove the value of the collateral released, the case was sent back for retrial on the issue of damages.<sup>47</sup>

### G. Remedies of a Secured Party Under Article 9 of the Uniform Commercial Code

The right of a secured party to repossess arises only upon an event of default which must be spelled out in the security agreement and must occur before the remedy is pursued.<sup>48</sup> In *Universal C.I.T. Credit Corp. v. Shepler*,<sup>49</sup> the court recognized that when repossession occurs prior to an event of default the debtor may recover in trover the reasonable market value of the collateral at the time of the wrongful repossession plus interest and special damages if proved, and punitive damages if the repossession is oppressive.<sup>50</sup> Even though the security agreement makes nonpay-

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<sup>46</sup>The problem here is analogous to the situation in which a creditor releases security of the principal with respect to a surety. The surety is discharged to the extent of the value of the collateral. *Compare* *Crim v. Fleming*, 101 Ind. 154 (1884), *with* *Alsop v. Hutchings*, 25 Ind. 347 (1865) (release of security subject to marshalling by dominant lienholder released dominant lien to extent of value of the property).

<sup>47</sup>It seems that there is a presumption that the collateral is equal to the amount of the debt and the burden of proving otherwise is upon the creditor who releases the collateral. *Cf.* *Mutual Benefit Life Ins. Co. v. Lindley*, 97 Ind. App. 575, 183 N.E. 127 (1933). In *Daly v. Nau* the court might well have cast the burden of proof upon the subordinating secured party since it was familiar with the collateral and related to the debtor.

<sup>48</sup>*Compare* U.C.C. § 9-501(1), (2) *with id.* § 9-503.

<sup>49</sup>329 N.E.2d 620 (Ind. Ct. App. 1975).

<sup>50</sup>In *Lou Leventhal Auto Co. v. Munns*, 328 N.E.2d 734 (Ind. Ct. App. 1975) a secured party repossessed before default. In a replevin action the debtor recovered \$30 nominal damages and \$1500 punitive damages. In *Shepler*, the court recognized the general rule that the secured party repossessing before default is liable for the reasonable market value of the collateral at the time of the conversion. However, as observed in the concurring opinion, the amount of the indebtedness must be deducted from the award. 329 N.E.2d at 630 (Garrard, J., concurring). *Accord*, *Rosenzweig v. Frazer*, 82 Ind. 342 (1882); *Shortal v. Standerford*, 87 Ind. App. 167, 157 N.E. 109 (1927). *See also* *Cox v. Albert*, 78 Ind. 241 (1881) (holding that the debtor may recover the value of pledged collateral if converted by the pledgee and the debtor is not in default). The court in *Shepler* also recognized that the plaintiff in trover is entitled to interest upon his recovery to time of judgment. 329 N.E.2d at 624. As a general rule, the plaintiff in trover is not permitted to recover loss of use of the converted goods as an element of damages, since by

ment of installments an event of default, acceptance of late payments without giving the debtor a reasonable opportunity to bring himself current will forfeit the creditor's right to declare a default.<sup>51</sup> Although these general principles were recognized by the *Shepler* court, an award of \$33,000 actual damages plus \$92,000 exemplary damages was reversed because the trial court failed to instruct the jury properly upon the right to repossess when the secured party deems himself insecure with respect to the debt or the collateral and the security agreement provides for that event. The Code specifies that such insecurity provisions must be exercised in good faith, but that the burden of proving bad faith is with the debtor.<sup>52</sup> Although the addition of a concurring opinion clouds the precise holding, it now seems that the court will admit evidence and tender instructions in which lack of good faith<sup>53</sup> is

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electing this remedy he has chosen to make the defendant a forced purchaser and is allowed only interest on the money claimed. *See, e.g.,* *Martinez v. Vigil*, 19 N. M. 306, 142 P. 920 (1914). However, the *Shepler* court recognized the Indiana rule that special damages may be awarded in trover if capable of reasonable proof. *Miller v. Long*, 126 Ind. App. 482, 131 N.E.2d 348 (1956) (plaintiff recovered for loss from flood when dam washed away because work could not be completed due to conversion of earthmoving machinery). The concurring opinion in *Shepler* indicated that the debtor could recover as special damages loss of use measured by loss of profits from an established lease of the equipment. 329 N.E.2d at 629 (Garrard, J., concurring). The concurring judge cited *Jerry Alderman Ford Sales, Inc. v. Bailey*, 154 Ind. App. 632, 291 N.E.2d 92 (1972), applying the Indiana rule in a case in which the plaintiff sought recovery alternatively for trover or breach of warranty. It seems that the court will limit the award of rental value or lost profits to the time reasonably necessary to replace the property when the suit is in trover. However, if the debtor pursues his remedy in replevin, he is entitled to reasonable rental value or loss of profits until possession is regained or until suit or judgment. *See, e.g.,* *General Motors Truck Co. v. Perry*, 99 Ind. App. 357, 192 N.E. 720 (1934); *Farrar v. Eash*, 5 Ind. App. 238, 31 N.E. 1125 (1892); *cf. Lou Leventhal Auto Co. v. Munns*, 328 N.E.2d 734 (Ind. Ct. App. 1975); *Wolff v. Slusher*, 314 N.E.2d 758 (Ind. Ct. App. 1974) (award of lost profit should be confined to loss of net profits). The lower court awarded punitive damages of \$92,000. Judge Garrard, concurring, found the award of punitive damages improper, but the majority made no finding on that issue. Punitive damages are proper in trover upon proof of malice, oppression or heedless disregard of the consequences. *See Nicholson's Mobile Home Sales, Inc. v. Schramm*, 330 N.E.2d 785 (Ind. Ct. App. 1975); *Monarch Buick Co., Inc. v. Kennedy*, 138 Ind. App. 1, 209 N.E.2d 922 (1965).

<sup>51</sup>329 N.E.2d at 627.

<sup>52</sup>IND. CODE § 26-1-1-208 (Burns 1974).

<sup>53</sup>"Good faith" is defined by the U.C.C. as "honesty in fact in the conduct or transaction concerned." *Id.* § 26-1-1-201(19). The court rejected a purely subjective test for determining "honesty in fact." 329 N.E.2d at 626. The concurring opinion attempted to define in general terms three situations in which a secured party or creditor acting in good faith would not accelerate the obligation because he deems himself insecure: when the insecurity clause

established by demonstrating that the secured party failed to make an honest and diligent effort to discover whether the security or debt was impaired, and that a reasonable man under the same set of circumstances, having made such an effort, would not have deemed himself insecure.

After default has occurred the secured party is permitted to repossess the collateral if he can do so without a breach of the peace.<sup>54</sup> Several dangers inherent in the exercise of this power were emphasized in *Nicholson's Mobile Home Sales, Inc. v. Schramm*,<sup>55</sup> a case in which the court determined that a junior secured party has no right to seize collateral which is in a senior lienholder's possession. The court found that the secured party's conduct—trespass upon the senior lienholder's property and assault and battery—during the course of its repossession of the collateral constituted a breach of the peace. The senior lienholder, a mobile home operator who held an artisan's lien on the collateral in his possession, was awarded punitive damages.

Once a secured party obtains possession of the collateral after default, he is permitted to dispose of it in accordance with provisions of article 9 of the Uniform Commercial Code.<sup>56</sup> As a general rule the UCC requires that he give notice of a sale to the debtor and conduct the sale in a commercially reasonable manner.<sup>57</sup> In *Magnavox Fort Wayne Employees Credit Union v. Benson*,<sup>58</sup> the debtor claimed that she was relieved of liability for an ensuing deficiency because the secured party had not given her notice of the sale. Although the court of appeals held that the secured party was not responsible for a sale held by an artisan to enforce his senior artisan's lien,<sup>59</sup> the court did not answer the question of whether a deficiency may be recovered by a secured party who

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is used as an afterthought, when a reasonable man under all the circumstances known to the creditor would not have taken the action, and when a reasonable man motivated by "good faith" would not have taken the action under such circumstances without further preliminary investigation. See *Mineika v. Union Nat'l Bank*, 332 N.E.2d 504 (Ill. Ct. App. 1975) (seizure of auto in an arrest for possession of marijuana and dismissal of criminal charges did not justify acceleration).

<sup>54</sup>IND. CODE § 26-1-9-503 (Burns 1974).

<sup>55</sup>330 N.E.2d 785 (Ind. Ct. App. 1975). The jury in this case denied recovery to the wife for personal injuries, but awarded damages for what amounted to conversion of the property. The argument that punitive damages were improper when the defendant could be prosecuted criminally was rejected by upholding the lower court's ruling denying such an instruction to the jury.

<sup>56</sup>IND. CODE § 26-1-9-504 (Burns 1974).

<sup>57</sup>*Id.*

<sup>58</sup>331 N.E. 2d 46 (Ind. Ct. App. 1975).

<sup>59</sup>See discussion of artisans' liens *infra* at note 95.

fails to give notice to the debtor or comply with UCC provisions on resale. Two lines of authority now prevail in other jurisdictions. One holds that the noncomplying secured party cannot recover a deficiency.<sup>60</sup> The other allows recovery of a deficiency subject to reduction by the amount the market value of the collateral exceeded the resale price. Under this rule there is a presumption that the value of collateral is equal to the secured obligation, with the burden of proving otherwise upon the secured party.<sup>61</sup> The UCC expressly allows the debtor equitable remedies against a threatened improper disposition of collateral and a right to recover his loss along with penalties when consumer goods are involved.<sup>62</sup> However, the Code is silent as to whether a deficiency judgment will be allowed or denied when the requirements for resale are not met, and the problem remains open in Indiana.<sup>63</sup>

#### *H. Mechanics' Liens on Real Estate*

A person furnishing work or materials for improvements upon real estate may secure a statutory mechanic's lien on the property under varying circumstances if notice of the lien is filed with the county recorder within sixty days after the work or materials

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<sup>60</sup>*See, e.g., Skeels v. Universal C.I.T. Credit Corp.*, 222 F. Supp. 696 (W.D. Pa. 1963), *affirmed on this point*, 335 F.2d 846 (3d Cir. 1964).

<sup>61</sup>*See, e.g., T. & W. Ice Cream, Inc. v. Carriage Barn, Inc.*, 107 N.J. Super. 328, 258 A.2d 162 (1969). Cases on the problem are collected in *United States v. Whitehouse Plastics*, 501 F.2d 692 (5th Cir. 1974). In addition to holding that the debtor has a right to defeat collection of a deficiency, all cases recognize the right of the debtor to collect damages resulting from noncompliance with resale provisions by the secured party. Under U.C.C. § 9-507 a statutory penalty is imposed when consumer goods are involved. *Walker v. V.M. Box Motor Co.*, 18 UCC REP. SERV. 1086 (Miss 1976). *See Annot.*, 35 A.L.R.3d 1016 (1971).

<sup>62</sup>U.C.C. § 9-507. This section allows recovery of "any loss" by the debtor or person entitled to notice of the sale. In the case of consumer goods, the penalty is the finance charge plus 10% of the cash price or the principal. The debtor may redeem from a purchaser at an improper sale after default unless the purchaser is protected in the case of a public sale as a purchaser without notice or in any other type of sale as a purchaser in good faith. U.C.C. § 9-504(4). *See also* § 9-506. It should be noted that § 9-507, giving remedies to the debtor, applies only after default. *See* § 9-501(1), (2), limiting part 5 of article 9 to cases in which the debtor is in default.

<sup>63</sup>Pre-Code law in Indiana is not helpful on this question. *See Shortal v. Standerford*, 87 Ind. App. 167, 157 N.E. 109 (1927) (improper disposition treated as a conversion satisfying the debt "at least" to the full value of the property converted). For a general discussion of the rights of a secured party who disposes of collateral without complying with part 5 of article 9 *see Henszey, A Secured Creditor's Right to Collect a Deficiency Judgment Under UCC § 9-504: A Need to Remedy the Impasse*, 31 BUS. LAW. 2025 (1976).

are "furnished."<sup>64</sup> Three recent decisions have construed the statute as to when materials or work have been "furnished" for purposes of fulfilling the filing time limits. In *Stanray Corp. v. Horizon Contruction, Inc.*,<sup>65</sup> the court of appeals reaffirmed the general rule that the mechanic supplying materials carries the burden of proving not only that the materials were sold for the purpose of being used in the particular improvement by the property owner or his representative, but that they were actually used in the project. Testimony of the owner that the materials were never ordered or used in the project and that the signature on a delivery order dated the last day for filing was not that of an authorized person supported the decision below denying a mechanic's lien, because notice was not filed within the statutory time. The court recognized, however, that the sixty-day period commences from the time of delivery and not from the time the materials were actually used in the project.<sup>66</sup> On the other hand, in *Van Wells v. Stanray Corp.*<sup>67</sup> the court of appeals recognized that a lien for delivered materials will be allowed when the materialman deals directly with the property owner who orders them for the project even though they are not actually used in the improvement.<sup>68</sup> This rule is based upon a theory of estoppel. The court also applied the rebuttable presumption that goods ordered for a particular project by an authorized individual and delivered to that project are actually used in the construction and the lien was allowed without proof that the materials delivered within sixty days before filing were, in fact, used. In *Gooch v. Hiatt*,<sup>69</sup> the court of appeals held that the sixty-day period for filing commenced from the time of corrective work done in good faith at the request of an owner who had not fully paid the contractor. In this case repairs were made upon a furnace and heating system some seven months after the construction was otherwise completed. The filing made within sixty days after completion of the repair was held sufficient.<sup>70</sup>

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<sup>64</sup>IND. CODE § 32-8-3-1 (Burns 1973).

<sup>65</sup>342 N.E.2d 645 (Ind. Ct. App. 1976).

<sup>66</sup>*Foster Lumber Co. v. Sigma Chi Chapter House*, 49 Ind. App. 528, 97 N.E. 801 (1912).

<sup>67</sup>341 N.E.2d 198 (Ind. Ct. App. 1976).

<sup>68</sup>The court did not actually apply the rule here, because the property had been conveyed successively to two straw owners during the process of construction.

<sup>69</sup>337 N.E.2d 585 (Ind. Ct. App. 1975).

<sup>70</sup>*Accord*, *Potter v. Cline*, 316 N.E.2d 422 (Ind. Ct. App. 1974), *discussed in Townsend, Secured Transactions and Creditors' Rights, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 305, 330 (1975).



While a mechanic's lien may not be asserted against the owner unless he or his authorized agent has contracted for the work, the lien may be claimed on a theory of unjust enrichment when work under an invalid or indefinite express contract is performed at the owner's request or allowed to continue with his assent.<sup>71</sup> The rule was applied by the trial court in *Marshall v. Ahrendt*,<sup>72</sup> where the contractor, proceeding under what was determined to be an indefinite contract, was allowed to recover in unjust enrichment without regard to the alleged terms of an oral contract. The court of appeals, however, ordered entry of judgment upon uncontradicted evidence supporting the owner's counterclaim for damages resulting from a leaky roof.

*Glick v. Seufert Construction & Supply Co.*<sup>73</sup> made it clear that a subcontractor engaged by a prime contractor may not hold the owner upon a theory of unjust enrichment (although in a proper case, he may assert a mechanic's lien against the owner's property) without substantial proof of a direct, unqualified request to perform from the owner.<sup>74</sup> In *Glick* the sub was induced by the owner to continue performance after the prime had defaulted and abandoned the work. The trial court denied the quasi contractual recovery sought by the sub against the owner. The court of appeals affirmed the decision, noting that since the owner had paid the defaulting prime contractor who had engaged the sub, there was no unjust enrichment. To the dissenting judge and this writer the evidence without conflict established an undertaking by the owner to see that the sub was paid.<sup>75</sup>

The Indiana statute provides for a general waiver of rights to a mechanic's lien when incorporated in a contract with the prime contractor. This waiver will bind subs as well if the contract is

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<sup>71</sup>See, e.g., *Martin v. Martin*, 122 Ind. App. 241, 103 N.E.2d 905 (1962) (improvements furnished on basis of oral promise to convey property; although promise not enforceable because of failure to comply with statute of frauds, plaintiff was allowed mechanic's lien and recovered in quasi contract). Cf. *Dyer Constr. Co. v. Ellas Constr. Co.*, 153 Ind. App. 304, 287 N.E.2d 262 (1972).

<sup>72</sup>332 N.E.2d 223 (Ind. Ct. App. 1975).

<sup>73</sup>342 N.E.2d 874 (Ind. Ct. App. 1976).

<sup>74</sup>This rule was also recognized in *Lake County Title Co. v. Root Enterprises, Inc.*, 339 N.E.2d 103 (Ind. Ct. App. 1975), in which it was held that an escrow agent who was required to obtain releases of mechanics' liens was not responsible for payments made by the owner to subs who had not properly recorded their liens. See Annot., 62 A.L.R.3d 288 (1975).

<sup>75</sup>Conflicting evidence was introduced as to the precise words employed by the owner in requesting the sub to finish the job after he discontinued the work "until I find out who is going to pay me." 342 N.E.2d at 878 (Lybrook, J., dissenting).



recorded within five days after its execution.<sup>76</sup> However, it seems clear that either a prime contractor or a sub may totally or partially waive his lien by separate agreement.<sup>77</sup> Does a sub who delivers materials to a project under a contract in which he waives his right to a lien retain an insurable interest in the property? In *All Phase Construction Corp. v. Federated Mutual Insurance Co.*,<sup>78</sup> the court of appeals held that the materialman retained an insurable interest in dry-wall delivered and installed in the project and destroyed by fire before payment. Because the insured sub's right to payment was conditioned upon acceptance by the prime contractor, which had not occurred, the court found an economic loss substantiating an insurable interest.

There is an inherent risk that a prime contractor to whom progress payments are made has not paid subcontractors, materialmen, and laborers.<sup>79</sup> An alternative to the owner's supervision of the construction to assure that subs are paid is his release of funds through an escrow agent who, in turn, is required to obtain partial releases as payments are made to the prime.<sup>80</sup> The responsibilities of the escrow agent were graphically illustrated in a most carefully written opinion by Judge Staton in *Lake County Title Co. v. Root Enterprises*,<sup>81</sup> a decision worthy of study by lawyers involved with problems of the construction industry. There, the owner-lessor agreed to furnish a maximum of \$35,000 to a lessee who, through a contractor or construction manager, undertook to build on the lessor's property. The funds were delivered to an escrow agent who agreed to make certain progress payments to the lessee's designee, the prime contractor, only after obtaining partial waiver of lien agreements from subs.<sup>82</sup> When the lessee defaulted after

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<sup>76</sup>IND. CODE § 32-8-3-1 (Burns 1973).

<sup>77</sup>See, e.g., *Hammond Hotel & Improvement Co. v. Williams*, 95 Ind. App. 506, 176 N.E. 154, *on rehearing*, 178 N.E. 177 (1931) (contractor waiving lien bound though lien was not properly recorded and even though owner in default); *George B. Swift Co. v. Dolle*, 39 Ind. App. 653, 80 N.E. 678 (1907) (waiver by subcontractor).

<sup>78</sup>340 N.E.2d 835 (Ind. Ct. App. 1976).

<sup>79</sup>See, e.g., *Bennett v. Pearson*, 139 Ind. App. 224, 218 N.E.2d 168 (1966). Cf. *Indianapolis Power & Light Co. v. Southeastern Supply Co.*, 146 Ind. App. 554, 257 N.E.2d 722 (1970) (involving lien on retainage held by owner).

<sup>80</sup>There are other methods of avoiding the risk of double payment. One is for the owner to require a construction bond securing performance and payment of mechanics. He may also obtain a no-lien contract from the prime contractor. IND. CODE § 32-8-3-1 (Burns 1973).

<sup>81</sup>339 N.E.2d 103 (Ind. Ct. App. 1975).

<sup>82</sup>The escrow agreement provided for payment to the lessee, who was to bear the risk of overruns in the cost only after obtaining "partial waiver of lien agreements on each pay out." *Id.* at 109. The agreement seemed to provide that subs entitled to payment should be determined from an affidavit pre-

most of the progress payments had been released, the lessor found that many contractors and materialmen had not been paid. The lessor, on his own, paid out an additional \$20,000 to these claimants. He then sought to hold the escrow agent liable in negligence for breach of its agreement to obtain the requisite waivers, as required by the escrow agreement. The appellate court held that the escrow agent was liable only for the claims of subs who held valid recorded mechanics' liens upon the property, and then only for the amount of their claims at the time the funds were released to the prime contractor. Thus his liability was properly limited to the loss caused by the acquisition of valid liens to the extent the liens would have been discharged had proper partial releases been obtained when the funds were disbursed. Payments made by the lessor-owner to contractors or materialmen who failed to record their liens within the sixty-day statutory period were found to be voluntary.<sup>83</sup> The court determined that no express or implied contractual liability existed between the lessor-owner and the subs, since the subs had contracted with the lessee or his prime contractor.<sup>84</sup>

This case teaches that materialmen will find no blessing in an escrow arrangement unless they are clearly made beneficiaries of the disbursement of funds.<sup>85</sup> Careful drafting of the escrow agreement can also assure the owner that funds will be paid out only after partial releases are obtained from subs. This protection is somewhat limited, however, if the disbursal is dependent upon affidavits of the prime contractor which may have been falsified.<sup>86</sup>

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pared by the lessee listing all contractors hired on the building program at the time of the first pay out.

<sup>83</sup>The trial court had held that if the owner-lessor had reimbursed a sub within 60 days after the last work or materials were furnished, the escrow agent who disbursed funds without procuring a partial release of amounts owing at the time of the pay out would be liable. The court on appeal apparently found either that all of the sub's work was furnished after the last pay out or that he was not listed as a contractor from whom releases were to be obtained. 339 N.E.2d at 115 n.13.

<sup>84</sup>Without full consideration of the peculiar arrangement between the lessor and the lessee, and the lessee and its prime contractor, the court applied the general rule that the owner has no contract liability to subs. See discussion at note 74 *supra*. It could have been argued, or evidence might have established, that the lessor and lessee were joint venturers, and that the person in charge of the building was a contract manager who merely served as an agent of the lessee, the owner, or both. Compare *O'Hara v. Architects Hartung & Ass'n*, 326 N.E.2d 283 (Ind. Ct. App. 1975).

<sup>85</sup>Although this escrow agreement did not do so, an escrow arrangement could provide for direct payment to subs. Cf. *Western Cas. & Sur. Co. v. State ex rel. Southeastern Supply Co.*, 146 Ind. App. 431, 256 N.E.2d 398 (1970) (bond of prime contractor construed to allow recovery by subs).

<sup>86</sup>In this case pay outs were to be made upon conditions established by affidavit of the lessee or his designatee. It appeared that the identity of subs

An owner who is confronted by claims of subs because of an escrow's failure to obtain releases or partial releases may be faced with two lawsuits—one involving foreclosure of mechanics' liens and the other directly concerning his rights against the escrow agent.

A mechanic may recover the contract price from his principal if a price has been agreed upon,<sup>87</sup> but he must prove the reasonable value of work or material if he is a sub claiming against the owner<sup>88</sup> or is claiming upon an implied contract.<sup>89</sup> In *Building Systems, Inc. v. Rochester Metal Products, Inc.*,<sup>90</sup> the contractor sought recovery from his employer-owner under a cost-plus agreement. The court of appeals recognized that general testimony of the contractor or his bookkeeper as to the total value of his work and materials admitted over objection would be insufficient to establish value; but when received without objection or when supported by specific proof as to each item, the testimony is sufficient to go to the trier of fact. The court also recognized that when an itemized account is submitted to the owner and received without objections recovery may be allowed upon the theory of an account stated,<sup>91</sup> but not when the submission is accompanied by a prompt objection or other conduct indicating that the owner is not bound.<sup>92</sup>

*York v. Miller*<sup>93</sup> instructs that the parties appealing from

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entitled to payment was also to be determined upon this affidavit. The court held that the escrow agent was not responsible for the accuracy of the documents upon which it relied. 339 N.E.2d at 112. See also *Richard's Lumber & Supply Co. v. National Bank*, 32 Ill. App. 3d 835, 336 N.E.2d 820 (1975), in which a lienholder had signed waivers of mechanics' liens in blank. The owner stole the waivers and procured a loan from the bank after completing the waivers. The court held for the bank.

<sup>87</sup>*Peter & Burghard Stone Co. v. Marion Nat'l Bank*, 198 Ind. 581, 153 N.E. 472 (1926).

<sup>88</sup>*Morris v. Louisville, N.A. & C. Ry.*, 123 Ind. 489, 24 N.E. 335 (1890). However, the price fixed by the contract between the sub and his employer will be prima facie evidence of the value of the work or materials against the owner. *Kendall Lumber & Coal Co. v. Roman*, 120 Ind. App. 368, 91 N.E.2d 187 (1950).

<sup>89</sup>*Prewitt v. Londeree*, 141 Ind. App. 291, 216 N.E.2d 724 (1966). If suit is brought upon an express contract in which the price is liquidated against the owner, the plaintiff may elect to bring suit upon the implied-in-law promise. His recovery, however, is measured by the reasonable value of the benefit received by the defendant and is limited by and pro-rated against the contract price. Cf. *Esarey v. Buhner Fertilizer Co.*, 117 Ind. App. 291, 69 N.E.2d 755 (1946).

<sup>90</sup>340 N.E.2d 791 (Ind. Ct. App. 1976).

<sup>91</sup>*Burns Constr., Inc. v. Valley Concrete*, 322 N.E.2d 404 (Ind. Ct. App. 1975).

<sup>92</sup>*Accord, Jasper Corp. v. Manufacturer's Appraisal Co.*, 153 Ind. App. 457, 287 N.E.2d 781 (1972).

<sup>93</sup>339 N.E.2d 93 (Ind. Ct. App. 1975).

mechanic's lien foreclosures must follow artificial and technical rules of appellate procedure, even in a case in which the judge has allowed litigation to continue endlessly after "final judgment."<sup>94</sup>

### I. Artisans' Liens

Section 9-310 of the UCC<sup>95</sup> accords super-priority status to an artisan who, in the ordinary course of his business, furnishes "services" or materials with respect to goods subject to a security interest, so long as he retains possession of the goods. The artisan's lien takes priority over prior perfected and unperfected security interests in the collateral.<sup>96</sup> Pursuant to this statute, the court of appeals held in *Magnavox Fort Wayne Employees Credit Union v. Benson*<sup>97</sup> that the possessory lien of a motor vehicle repairman took priority over a previously perfected security interest. The rule was again applied in *Nicholson's Mobile Home Sales, Inc. v. Schramm*,<sup>98</sup> in which the appellate court held that the possessory lien of a mobile home park operator for unpaid rent took priority over an unperfected purchase money security interest in the mobile

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<sup>94</sup>In this case, after a default foreclosure decree and after the time for filing an appeal, the trial court allowed intervention by the debtor's creditors. At the same time the debtor filed a Trial Rule 60(B) motion challenging the judgment. When the Rule 60(B) motion was denied, the debtor filed a motion to correct errors from which an appeal was taken. Four months later the court granted the claims of the intervenors. The court was puzzled by an appeal taken from a ruling upon a motion to correct errors entered four months before. However, it wisely considered the merits of the case, not as it related to the judgment, but as it concerned the manner of the sale held by the sheriff under it. The court determined that there was no requirement that the land be sold in parcels and that the evidence did not establish inadequacy of the price. Actually, it seems that the court treated the Rule 60(B) motion as an equitable remedy seeking relief from an improper sale. Compare *Bishop v. Moorman*, 98 Ind. 1 (1884) (equity properly restrained sheriff's sale). The case may stand for the proposition that a court of equity which has entered a decree ordering sale of property retains jurisdiction to review the conduct of the sale by motion or by independent action. The court's concern about the fact that the ruling on a motion to correct errors had occurred before the trial court had finished with its business again demonstrates that the requirement of a motion to correct errors as a condition to an appeal is not only confusing, but unwise.

<sup>95</sup>IND. CODE § 26-1-9-310 (Burns 1974).

<sup>96</sup>The statute was applied in *Yeager & Sullivan, Inc. v. Farmers Bank*, 317 N.E.2d 792 (Ind. Ct. App. 1974) (pig feeder); *Charlie Eidson's P&B Shop, Inc. v. Commercial Credit Plan, Inc.*, 146 Ind. App. 209, 253 N.E.2d 717 (1969). See generally Annot., 69 A.L.R.3d 1162 (1976).

<sup>97</sup>331 N.E.2d 46 (Ind. Ct. App. 1975), also discussed in text accompanying notes 58-63 *supra*.

<sup>98</sup>330 N.E.2d 785 (Ind. Ct. App. 1975). This case is also discussed in text accompanying notes 31-35 *supra*.

home. This conclusion was reached by finding that the operator's claim for rent was for "services" and thus within U.C.C. § 9-310. The court also determined that the debtor-lessee was a "guest" within the terms of a statute<sup>99</sup> giving a mobile home park operator the lien of an innkeeper on the property of his "guest" for rent.<sup>100</sup>

The *Benson* case ventured into the uncharted area of the rights and duties of the artisan and junior secured parties when the artisan's lien is foreclosed under a statutory power of sale.<sup>101</sup> Apparently the artisan failed to give notice to the debtor and failed to offer the collateral at "public auction" as required by statute.<sup>102</sup> Instead he purchased the collateral at a private sale and, after deducting his claim from the sale price, remitted the balance to the junior secured party, who then sought recovery of the remaining deficiency against the debtor. The court properly held that because the secured party was not a party to the artisan's sale he was not bound to give notice and comply with the provisions of the Uniform Commercial Code.<sup>103</sup> However the secured party aided and abetted the artisan by furnishing him a repossession title.<sup>104</sup> The case does not clarify the duty of a junior secured party to exercise reasonable care to protect the debtor's interests when

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<sup>99</sup>IND. CODE § 13-1-7-33 (Burns 1973). This statute creates an innkeeper's lien upon the property of a guest of a mobile home park operator, and was read in conjunction with *id.* § 32-8-27-2, giving innkeepers a lien upon any article of value brought into a hotel. The court also held that the mobile home park operator's lien depended upon possession, which was found to exist in this case although the facts did not clearly show whether the operator had regained possession of the leased space, the mobile home, or both.

<sup>100</sup>This decision disposes of the extremely strange case of *Highland Realty Corp. v. Indianapolis Morris Plan Corp.*, 136 Ind. App. 208, 199 N.E.2d 110 (1964), in which the court and the attorneys overlooked the statute creating a lien in the innkeeper's favor.

<sup>101</sup>IND. CODE § 9-9-5-6 (Burns 1973).

<sup>102</sup>*Id.* This statute requires newspaper advertisement of the sale two times in successive weeks, 15 days' notice to the owner by registered mail, and sale at "public auction" to the highest bidder for cash. Purchase by the artisan is permitted. The statute also provides for issuance of a new certificate of title by the Secretary of State to the purchaser on proof of facts showing a proper sale.

<sup>103</sup>Procedures for disposing of collateral by the secured party are specified in IND. CODE § 26-1-9-504 (Burns 1974) requiring that notice of the sale be sent to the debtor and that a sale be conducted in a commercially reasonable manner.

<sup>104</sup>The repossession title was obtained by the junior secured party in the expectation of foreclosing its lien. After unsuccessfully requesting that the artisan surrender possession of the vehicle, the junior secured party kept the repossession title until the vehicle was sold and received the money remaining after satisfaction of the artisan's lien.

collateral is being sold by a senior lienholder,<sup>105</sup> nor the effect of a sale by an artisan who fails to give notice and sell at "public auction" as required by the artisan's lien statute.<sup>106</sup> A strong argument could have been made that the junior secured party who participated in the sale by surrendering a repossession certificate of title to the artisan owed a duty to the debtor to be certain that the artisan fulfilled legal requirements in conducting the sale.<sup>107</sup>

Hornbook law states that an artisan's lien is a possessory lien which disappears when the lienholder voluntarily surrenders possession.<sup>108</sup> This rule was recognized by the court in *Hendrickson & Sons Motor Co. v. Osha*,<sup>109</sup> which held that an automobile mechanic relinquished his lien upon surrendering possession of the car to its owner. After having made a series of repairs on credit, the mechanic finally retained possession and asserted his lien, but the court held that the lien extended only to the last work performed and did not cover prior credit. However, the *Osha* court, in dictum, recognized a kind of nonpossessory artisan's lien by reconciling the effect of two Indiana statutes<sup>110</sup> giving mechanics furnishing services and accessions a lien upon motor vehicles. Indiana Code section 32-8-31-3<sup>111</sup> requires the artisan to record notice of his lien in the miscellaneous records of the county where the work is done within sixty days of completion. Despite the fact that the statute does not expressly so provide, the court found that

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<sup>105</sup>See IND. CODE § 26-1-9-207 (Burns 1974) with respect to the duties of a secured party in possession, and discussion at notes 58-63 *supra*.

<sup>106</sup>Unsuccessful efforts were made to sell the vehicle at an automobile auction and bids were taken from dealers, but the opinion indicates no evidence of a public auction of which the owner-debtor was given notice. The facts also failed to show that the junior secured party was given notice of a sale by public auction.

<sup>107</sup>Because the secured party was in possession of the repossession certificate of title, it seems that he was under a duty to use reasonable care with respect to the title. Compare *White v. Household Finance Corp.*, 302 N.E.2d 828 (Ind. Ct. App. 1973). Evidence of compliance with the foreclosure provisions of the artisan's lien law is required as a condition to obtaining a new certificate of title. IND. CODE § 9-9-5-6 (Burns 1973). These points were not considered in the appeals court decision.

<sup>108</sup>*Vaught v. Knue*, 64 Ind. App. 467, 115 N.E. 108 (1917).

<sup>109</sup>331 N.E.2d 743 (Ind. Ct. App. 1975).

<sup>110</sup>One of these was the statute of the motor vehicle code which recognizes the possessory type of artisan's lien. IND. CODE § 9-9-5-6 (Burns 1973). The other statute, providing for recordation of notice of the lien, is *id.* § 32-8-31-3. These statutes, along with the common law lien, were found to coexist without conflict. 331 N.E.2d at 755.

<sup>111</sup>IND. CODE § 32-8-31-3 (Burns 1973). The statutes include no provision recognizing the lien as dependent upon possession, and provide only for judicial foreclosure of the lien within one year after recordation of the notice of intent to hold the lien. *Id.* § 32-8-31-5.

this law, unlike other artisan statutes,<sup>112</sup> enables the artisan to retain his lien without keeping possession and also allows him to perfect his lien as against subsequent purchasers and creditors simply by recording the notice. This conclusion cannot withstand the light of day for several reasons. Constructive notice of liens on motor vehicles is generally provided by notation on the certificate of title by a public official.<sup>113</sup> Furthermore, if constructive notice is imparted by means of recordation of the artisan's lien, every buyer or creditor obtaining an interest in a motor vehicle would be required to search the miscellaneous records of all ninety-two Indiana counties.<sup>114</sup> Hopefully, this absurd result will invite the court to reconsider its ill-advised dictum when the matter comes up for decision. The requirement for recordation can be justified on the ground that it provides an evidentiary base for those claiming through foreclosure of an artisan's lien, one of the sound purposes of most recording statutes.<sup>115</sup>

#### *J. Proceedings Supplemental to Execution—Right to Notice and Hearing*

Failure of the court or the plaintiff to give the defendant and his garnishee notice and a hearing before entry of an order against the garnishee, contrary to the debtor's exemption rights,<sup>116</sup> was considered in *Citizen's National Bank v. Harvey*.<sup>117</sup> The failure

<sup>112</sup>Various statutes give artisans liens upon goods. In addition to the statutes cited at notes 110-11 *supra*, see *id.* § 32-8-30-1.

<sup>113</sup>IND. CODE § 26-1-9-302(3), (4) (Burns 1974).

<sup>114</sup>*Accord*, Note, *Certificate of Title as Notice of Liens upon Motor Vehicles*, 25 IND. L.J. 337, 348-49 (1950).

<sup>115</sup>One of the important purposes of recordation statutes is that recordation thereunder makes out a *prima facie* case of execution and validity of the transaction recorded. See, e.g., *Carver v. Carver*, 97 Ind. 497, 512 (1884).

<sup>116</sup>The court ordered payment of the maximum amount allowed under the garnishment provision of the Uniform Commercial Credit Code, IND. CODE § 24-4.5-5-105 (Burns 1974), which would have been 25% of the garnishee's weekly disposable earnings in excess of 30 times the minimum wage. However, since the entry of that order, the Indiana Supreme Court has held that the debtor is entitled to the highest exemption allowed under that law or the general exemption laws of Indiana. *Id.* § 34-2-28-1(d) (Burns 1973) has two limitations: if the debtor is a resident householder and the indebtedness arose out of a contractual obligation the allowable exemption is \$15 per week plus 90% of the balance of the debtor's weekly earnings. *Id.* § 34-1-44-7 exempts 90% of the income of a debtor who is not a resident householder. *Mims v. Commercial Credit Corp.*, 307 N.E.2d 867 (Ind. 1974). The *Mims* case also held that the court has an affirmative burden to allow the exemption when the defendant is not represented by counsel. See Townsend, *Secured Transactions & Creditors' Rights*, 1974 *Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 254-57 (1974), for a discussion of the *Mims* case.

<sup>117</sup>339 N.E.2d 604 (Ind. Ct. App. 1976).



was held not a jurisdictional error rendering "void" an order in proceedings supplemental enforcing a judgment entered upon default of the defendant who failed to appear.<sup>118</sup> The court held, however, that, subject to the defense of laches, the defendant could avoid the judgment upon general equitable grounds.<sup>119</sup> Indiana Trial Rules provide, in effect, that if *A* sues *B* and asks for \$100, a default judgment of \$1,000 for failure to appear should not be allowed unless new service or notice of the additional claim is given to *B* and he is allowed to defend on the new claim.<sup>120</sup> Fair play seems to compel a similar result when a garnishment order is

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<sup>118</sup>Since proceedings supplemental were deemed a continuation of the original lawsuit, of which the defendant was properly notified, the court held that the principal defendant was not, as a constitutional principle, entitled to a new summons or notice. The judgment therefore was held not "void" within the provisions of Trial Rule 60(B)(6). However, one may wonder how a judgment against a garnishee can ever be valid if it is issued without notice to the garnishee and a hearing. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Chesser v. Chesser*, 343 N.E.2d 810 (Ind. Ct. App. 1976) (party served by leaving of summons at old address and no evidence presented to show that copy was also sent by mail as required by IND. R. TR. P. 4.1 (A)(3), (B)).

The opinion made much of the fact that proceedings supplemental to execution is not a new action, but is a continuation of the original suit. The court appears to be half-right. Decisions properly indicate that the plaintiff may either proceed by independent suit or by motion for proceedings supplemental as provided by Trial Rule 69(E). *McCarthy v. McCarthy*, 297 N.E.2d 441 (Ind. Ct. App. 1973) (filing under a separate cause number as a separate action indicated as proper). See also Townsend, *Secured Transactions and Creditors' Rights, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 234, 262-63 (1974); Townsend, *Secured Transactions and Creditors' Rights, 1973 Survey of Recent Developments in Indiana Law*, 7 IND. L. REV. 226, 241-44 (1973).

<sup>119</sup>The court applied the catch-all provision of Trial Rule 60(B)(8). Since the order in this case was a continuing one (*i.e.* to pay from weekly earnings) it could be argued that the court retains inherent power to modify such a decree under residual equity power. Compare *Wilson v. Wilson*, 349 N.E.2d 277 (Ind. Ct. App. 1976).

<sup>120</sup>See IND. R. TR. P. 9(G) and 54(C). Notice of an application for a default judgment must be given only if the defendant has appeared. IND. R. TR. P. 55(B). Similarly, notice of a judgment need not be mailed by the clerk to parties in default for failure to appear. IND. R. TR. P. 72(D). Hence, if a default judgment for failure to appear is entered in excess of the prayer for relief, the defendant has no practical way of learning of the unexpected turn of events. Case law indicates that a party is entitled to some kind of notice and hearing in this kind of situation. *State ex rel. Brubaker v. Pritchard*, 236 Ind. 222, 228, 138 N.E.2d 233, 236 (1956) (court retained jurisdiction to punish defendant for contempt of order in original action "after notice to the party or his attorney"); *Smith v. Indiana State Bd. of Health*, 303 N.E.2d 50 (Ind. Ct. App. 1973) (contempt hearing held without giving attorney sufficient preparation time held to be denial of due process when proceedings were instituted after a decree obtained by proper service.)



entered without notice or hearing in the enforcement of a judgment granted on default of the defendant for failure to appear, especially when such relief is not sought in the original complaint. In fact, there is no reason why a plaintiff anticipating collection problems cannot include a prayer for supplemental relief in his original complaint if such is his intention.<sup>121</sup> Hopefully, the *Harvey* decision will not encourage the practice of failing to give notice simply because the error, if any, was determined not to be jurisdictional. Although accompanied by a sad lack of judicial enthusiasm, the case clearly holds that some sort of notice and hearing must be afforded the debtor and garnishee in proceedings supplemental when judgment in the principal action is entered upon default for failure to appear. Conduct of the sort found in the *Harvey* case should be deterred with adequate punitive damages when judgment is wrongful and, if the practice persists, it should catch the eye of proper disciplinary authorities. A new rule clarifying the problem would be helpful.

#### K. Creditors' Rights Against Decedent's Estates

Suppose that *D*, a multimillionaire, drowns on January 1, his estate is opened with notice to creditors on January 10, his body recovered in July, and the funeral director thereafter prepares his body for burial, conducts the funeral and incurs expenses totaling \$5,000. The funeral director has no claim against his estate according to the questionable decision of the Indiana Court of Appeals in *Richardson v. Richardson*.<sup>122</sup> The court based its decision on the ground that funeral expenses are designated as "claims" under a priority provision of the probate code.<sup>123</sup> The court thus found that funeral expenses, as "claims," must be filed within six months (now five) after the first published notice to creditors, provided that administration is opened within one year.<sup>124</sup> Although the case did not involve the facts posed above,

<sup>121</sup>IND. R. TR. P. 18(B) provides: "Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two [2] claims may be joined in a single action . . . ."

<sup>122</sup>345 N.E.2d 251 (Ind. Ct. App. 1976). The funeral director had filed his claim with the domiciliary representative appointed in Florida. It appeared that the Florida estate would be insufficient to satisfy the claim if it were allowed. Compare *Hensley v. Rich*, 191 Ind. 294, 132 N.E. 632 (1921).

<sup>123</sup>IND. CODE § 29-1-14-9 (Burns Supp. 1976). Actually, the general definition section defines "claims" as including funeral expenses. *Id.* § 29-1-1-3.

<sup>124</sup>With certain exceptions, including expenses of administration and government claims, all "claims" must be filed within five months after the date of the first published notice to creditors, and in any case administration must be commenced within one year after death of the decedent. *Id.* § 29-1-14-1.

the decision supports the thesis of some laymen that all is not right in probate matters. Almost anyone on the street would agree that the cost of disposing of the body should take priority over most other claims and disbursements to heirs and devisees. Technically, omission of funeral expenses in the non-claim provision of the probate code expressly exempting expenses of administration and government claims indicates a legislative intent to exclude funeral expenses. But, in terms of common sense, the scheme of the code is not so precise as to invoke reliance on such a technical construction.<sup>125</sup>

An award of money to a spouse in gross as alimony or property division may be proved against a decedent's estate even though payable in installments which are not yet due, according to *White v. White*,<sup>126</sup> a recent court of appeals decision which applied the divorce statute enacted prior to the present law. Nothing in the new no-fault divorce statute indicates that the result of this case will be changed.<sup>127</sup>

Although a tort claim against an estate may be time-barred by the non-claim statute, recovery against the personal representative will be allowed to the extent of any liability insurance if the claim is not outlawed by the general statute of limitations.<sup>128</sup> In such cases a tort claimant may testify as to relevant transactions with the deceased, notwithstanding the dead man's statutes.<sup>129</sup> The reason for this exception to the dead man's statute is that a

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<sup>125</sup>Funeral expenses are expressly included within the general definition of "claims." *Id.* § 29-1-1-3. It seems that the court should have found a safety valve in the general definition section, which provides that "definitions . . . shall apply to words used in this Code *unless otherwise apparent from the context.*" *Id.* (emphasis added). Allowance of funeral expenses rests upon the duty of the representative to see that they are paid without requiring aggressive action by the person entitled to payment. The same reasoning applies to costs of administration and distributions to heirs and devisees; all are rights against the estate rather than claims in this context.

<sup>126</sup>338 N.E.2d 749 (Ind. Ct. App. 1975). For another discussion of this case, see Proffitt, *Domestic Relations*, *supra*.

<sup>127</sup>Provisions for property settlement may not be revoked or modified. IND. CODE § 31-1-11.5-17 (Burns Supp. 1976). The court relied in part on this statute in determining that the award of a sum in gross, although payable in installments, did not cease on death of the obligor. The same section also provides that child support orders are not revoked by death of the parent, although they are modifiable. After the parent's death, a child support decree may be modified on petition of the parent's representative. No provision is made with respect to modification of maintenance orders in favor of a wife, but case law indicates that the order is modifiable. *See id.* § 31-1-11.5-9(c).

<sup>128</sup>*Id.* § 29-1-14-1(f).

<sup>129</sup>*See Jenkins v. Nachand*, 154 Ind. App. 672, 290 N.E.2d 763 (1972), in which the action against the representative was commenced after the plaintiff's tort claim was barred by the non-claim statute.

judgment enforceable only against the insurer will not deplete the estate. However, in *Crawford v. Wells*,<sup>130</sup> the court held that the tort claimant's act of testifying on his own behalf in litigation involving a claim not yet barred by the non-claim statute cannot be treated as a waiver of his right to recover in excess of policy limits. In such cases the representative must object to his testimony or he will be held to have waived the effect of the dead man's statute.

### L. Bankruptcy

A claim for "alimony due or to become due or for maintenance or support of a wife or child" is excepted from the provisions of the bankruptcy act.<sup>131</sup> When a wife is awarded the benefit or payments of money in divorce proceedings, the courts have had difficulty determining whether the obligation of the husband is "alimony" or something else. It often is assumed that if the settlement or decree awards her money in lieu of interests held by her in property it is not alimony.<sup>132</sup> On the other hand, if its purpose is to provide support or is based upon need, her claim is alimony and therefore not dischargeable.<sup>133</sup> When the issue was presented to the Seventh Circuit Court of Appeals in *Nichols v. Hessner*,<sup>134</sup> the court reversed the lower court's holding that a settlement approved by decree of court awarding the wife \$1,000 per month for 120 months was alimony. The case was remanded with instructions for further findings on the extent to which the settlement and decree were based upon a division of marital property or upon income of the parties. That part of the agreement calling for payment to balance income of the parties would be alimony and not dischargeable. If payment was based only on a division of property of the marriage, it would be discharged. The case was decided by reference to the uncertain background of Indiana case law defining "alimony" prior to the current no-fault divorce law.<sup>135</sup>

<sup>130</sup>334 N.E.2d 869 (Ind. Ct. App. 1976) (representative substituted in action commenced before death of decedent).

<sup>131</sup>Bankruptcy Act § 17a(7), 11 U.S.C. § 35(a)(7) (1970).

<sup>132</sup>See, e.g., *Abrums v. Burg*, 327 N.E.2d 745 (Mass. 1975).

<sup>133</sup>See, e.g., *In re Ridder*, 79 F.2d 524 (2d Cir. 1935). Also included are provisions of a decree or settlement requiring payment of marital obligations. *In re Waller*, 494 F.2d 447 (6th Cir. 1974) (divorce decree holding wife harmless for prior debts held not dischargeable); *Poolman v. Poolman*, 289 F.2d 332 (8th Cir. 1961) (husband bound to make payments on home, not dischargeable).

<sup>134</sup>528 F.2d 304 (7th Cir. 1976).

<sup>135</sup>For recent decisions interpreting present Indiana law, see *Liszkai v. Liszkai*, 343 N.E.2d 799 (Ind. Ct. App. 1976) ("alimony" award held an improper designation), discussed in Proffitt, *Domestic Relations*, *supra*;

The present Indiana statute on disposition of property in divorce proceedings allows the court to consider "economic circumstances of the parties" and the "earnings or earning ability of the parties."<sup>136</sup> Maintenance is not allowed to a spouse unless the person is "physically or mentally incapacitated to the extent that the ability . . . to support himself or herself is materially affected."<sup>137</sup> *Nichols*, as a result, places a severe burden upon the courts which must now determine the extent to which the settlement or agreement represents a division of property and the extent to which an award of money was intended to make up a differential in the spouses' incomes. The court indicated that this is a matter which could be spelled out by the terms of a divorce settlement or decree.<sup>138</sup> However, it seems unlikely that bankruptcy should or will be one of the determinable considerations in divorce proceedings. When there is substantial property for division the spouse who is entitled to a money award may ask the court to impose a lien upon assets retained by the paying party and thus receive protection which will survive bankruptcy.<sup>139</sup> On the other hand, when there is little marital property any affirmative award is most likely to be granted because of need or inequality in earning power, so that the obligation will qualify as alimony under the bankruptcy law.

The *Nichols* court also held that interest accruing on the alimony claim is a non-dischargeable debt, but that an award of attorneys' fees to the spouse in an action for unpaid alimony by a court other than the divorce court was not alimony. Since attorneys' fees, when allowed, almost universally are regarded as a part of alimony,<sup>140</sup> there seems to be no basis for this curious result.

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Temple v. Temple, 328 N.E.2d 227 (Ind. Ct. App. 1975) (wife not entitled to support although she suffered from grand mal epilepsy), *discussed in* Fox, *Domestic Relations, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 197, 207 (1975).

<sup>136</sup>IND. CODE § 31-1-11.5-11 (Burns Supp. 1976).

<sup>137</sup>*Id.* § 31-1-9-10.

<sup>138</sup>The label placed upon an award should not be determinative of whether it is a property settlement, maintenance agreement, or income adjustment. *In re Nunnally*, 506 F.2d 1024 (5th Cir. 1975).

<sup>139</sup>IND. CODE § 31-1-11.5-15 (Burns Supp. 1976). *But see* Eppley v. Eppley, 341 N.E.2d 212 (Ind. Ct. App. 1976) (court properly declined to require security from husband ordered to pay wife).

<sup>140</sup>*In re Corish*, 529 F.2d 1363 (7th Cir. 1976) (attorney's fees awarded to wife but ordered to be paid directly to her attorney, constituted a non-dischargeable debt in bankruptcy proceedings); *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975). Cases also hold that an award of attorneys' fees arising from later enforcement of an alimony decree constitute alimony. *In re Hargrove*, 361 F. Supp. 851 (W.D. Mo. 1973) (attorneys' fees awarded in hearing on modification of divorce decree after bankruptcy). *Cf. In re Goden*, 411 F. Supp. 1076 (S.D. N.Y. 1976) (penalty for late payments held to be alimony).

This tends to force creditors with undischarged alimony claims to take their case back to the original divorce court when enforcement is necessary, a policy at war with the new power granted bankruptcy courts to determine dischargeability and fix liability on claims which they find not to be discharged.

A customer list that meets the requirements of a trade secret is a property right of the bankrupt owner which passes to the trustee taking over a going business.<sup>141</sup> The Seventh Circuit Court of Appeals in *In re Uniservices, Inc.*,<sup>142</sup> upheld a declaratory order that the chief executive officer of a corporation in a Chapter 10 proceeding could not compete within a radius of 75 miles<sup>143</sup> for a two-year period because of his familiarity with the customers of the corporation. The decision was based upon the fact that the officer and his family had sold the assets of the business with "trade routes, covenants and agreements" to the bankrupt some years prior to bankruptcy. Further, the information concerning customers and their habits and needs had been treated as highly confidential and valuable by the officer before and after Chapter 10 proceedings.<sup>144</sup> A limited covenant not to compete was implied from the confidential relationship between the officer and the bankrupt.<sup>145</sup>

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<sup>141</sup>*Cf.* *Sawilowsky v. Brown*, 288 F. 533 (5th Cir. 1923) (goodwill, including the right to use a trade name, can be sold with bankrupt's business). The Bankruptcy Act passes title to patents, copyrights and trademarks. 11 U.S.C. § 110 (1970).

<sup>142</sup>517 F.2d 492 (7th Cir. 1975).

<sup>143</sup>The order was restricted to an area within 75 miles of a line between Fort Wayne and Indianapolis, Indiana.

<sup>144</sup>The court purported to weigh the interests of the officer to pursue gainful employment against the need of the business to protect confidential information while proceeding under a Chapter 10 bankruptcy. No injunction against the executive officer was issued, only a declaratory order.

<sup>145</sup>It seems that the decision was not limited to protecting only customer lists as trade secrets. Liability was based upon the existence of a confidential relation between the seller of a business who continued as its chief executive officer and the buyer. By finding a contract for a limited period of two years, the court avoided drafting an order defining what information could be used. Decisions to this effect will also be found in other states. *Cf.* *Terminal Vegetable Co. v. Beck*, 8 Ohio App. 2d 231, 196 N.E.2d 109 (1964) (goodwill transferred to a buyer is a property right that must be respected by the seller for a time sufficient to permit the buyer to make the business customers his own). The decision in *Terminal Vegetable* rested upon *Westervelt v. Nat'l Paper & Supply Co.*, 154 Ind. 673, 57 N.E. 552 (1900), in which the court held that an employee's duty not to divulge a trade secret constituted an implied promise. That Indiana law would neither imply a promise not to compete nor hold that the confidential relation barring competition continues after the termination of employment, see *Epperly v. E. & P. Brake Bonding, Inc.*, 348 N.E.2d 75 (Ind. Ct. App. 1976). Indiana courts have not favored covenants not to compete. *Frederick v. Professional Bldg. Maintenance Indus.*,

*Uniservices* does not deal with the related problem involving a bankrupt's promise not to compete or his misuse of trade secrets. Inconclusive authority indicates that so long as only the right of competition is involved, a discharge in bankruptcy will relieve the bankrupt from covenants not to compete.<sup>146</sup> Liability for misuse of trade secrets or malicious prior violations of an agreement not to compete will not be affected by the wrongdoer's discharge in bankruptcy.<sup>147</sup>

*M. Miscellaneous—Attorneys' Fees; Truth in Lending Disclosures*

Once again the Indiana Court of Appeals has construed a provision for reasonable attorneys' fees as not including an attorney's fee incurred in successfully defending a case on appeal.<sup>148</sup> If the decision stands for the proposition that it is "unreasonable" for a winning party to engage a lawyer to represent him on appeal, there may be some merit to the holding, for most lower court decisions are affirmed on appeal.<sup>149</sup> If the decision stands for the policy of barring contract provisions for attorneys' fees on appeal because such a provision tends to chill a party's right to take his case to a higher court<sup>150</sup> the court speaks with forked tongue.

Inc., 344 N.E.2d 299 (Ind. Ct. App. 1976); *Struever v. Monitor Coach Co.*, 294 N.E.2d 654 (Ind. Ct. App. 1973).

<sup>146</sup>*Heyl v. Emery & Kaufman, Ltd.*, 204 F.2d 137 (5th Cir. 1953) (a list of policy dates kept by a bankrupt insurance agent held his personal property and trustee could not sell the list and thereby prevent bankrupt's solicitation of former customers). *Cf. Trask v. Susskind*, 376 F.2d 17 (5th Cir. 1976).

<sup>147</sup>*National Homes Corp. v. Lester Indus., Inc.*, 336 F. Supp. 644 (W.D. Va. 1972) (prior award of punitive damages based on violation of a covenant not to compete was not discharged in bankruptcy because the award was based on willful and malicious property damage done by the bankrupt).

<sup>148</sup>*Kagan v. Auto-Teria, Inc.*, 342 N.E.2d 890 (Ind. Ct. App. 1976) (denial of request for attorney fees accrued in defense of a judgment upon a promissory note which provided for "reasonable attorney fees"). *Accord, Willsey v. Hartman*, 150 Ind. App. 485, 276 N.E.2d 577 (1971). *Cf. Honey Creek Corp. v. WNC Development Co.*, 331 N.E.2d 452 (Ind. Ct. App. 1975) (award of attorney fees in judgment merged right to recover additional fees accrued on appeal).

On the other hand, attorneys' fees may be awarded a spouse for an appeal from a divorce, custody or support proceeding. *Linton v. Linton*, 336 N.E.2d 687, 339 N.E.2d 96 (Ind. Ct. App. 1975); *Inkoff v. Inkoff*, 306 N.E.2d 132 (Ind. Ct. App. 1974).

<sup>149</sup>A cursory study of approximately 100 Indiana decisions in volumes 339 to 342 of West's *Northeastern Reporter*, Second Series, shows that an appellant's chance of obtaining relief upon appeal is about 30%; the appellee's chance of winning on appeal is about 70%. In *Bureau of Motor Vehicles v. Waller*, 339 N.E.2d 61 (Ind. Ct. App. 1975) the appellee, who did not appear by counsel or otherwise, won his case, with one judge dissenting.

<sup>150</sup>See *State ex rel. Reilly v. United States Fid. & Guar. Co.*, 218 Ind. 89, 95, 31 N.E.2d 58 (1941) (bondsmen on appeal bond not liable for attorneys'

Probably nothing has operated to discourage appeals more than Trial Rule 59(G) and some of the disgraceful unresolved problems under it.<sup>151</sup>

In *Allen v. Beneficial Finance Co.*,<sup>152</sup> the Seventh Circuit Court of Appeals found that the jumbled disclosures appearing in a statement made by a finance company in connection with a consumer credit loan were not in "meaningful sequence," and, therefore, did not meet the requirements of Regulation Z of the Federal Truth in Lending Act.<sup>153</sup> The fact that the disclosure forms were designed for multistate use on a national computer did not relieve the lender of his statutory liability to the borrower. Where but one disclosure statement was furnished to joint obligors as permitted by the regulations, each was entitled to recover the penalties provided by the law.<sup>154</sup>

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fees incurred in defending an appeal because to hold otherwise would deter appeals).

<sup>151</sup>Probably the best example of the unfairness of Trial Rule 59(G) and its application is the horrid predicament created by *Richards v. Crown Point Community School Corp.*, 256 Ind. 347, 269 N.E.2d 5 (1971) holding that a partial summary judgment was final. Subsequent decisions reach another result. See, e.g., *Stanray Corp. v. Horizon Constr., Inc.*, 342 N.E.2d 645 (Ind. Ct. App. 1976). The purpose of this uncertainty, particularly in view of the clarity of the rules with respect to finality of judgments on a part of the issues, can only be to discourage appeals and to make them unduly burdensome. Much of the difficulty could simply be eliminated by excluding the motion to correct errors as a condition to an appeal, leaving it optional and requiring a ruling on the motion within 10 days, as provided by the federal rules. Time for taking the appeal would be extended in case of the motion and computed from the time of the ruling on the motion or 10 days after the motion, whichever is less. Whether this suggestion is heeded or not, it is no understatement to observe that opinions under Trial Rule 59(G) have not added to the stature of the appellate courts.

<sup>152</sup>531 F.2d 797 (7th Cir. 1976).

<sup>153</sup>*Id.*, applying Fed. Reserve Bd. Reg. Z 12 C.F.R. § 226.6(a) (1976) and Public Position Letter No. 780, Fed. Reserve Bd. (April 10, 1974). Other Seventh Circuit decisions dealing with the Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1700 (Supp. IV 1974), include *Goldman v. First Nat'l Bank*, 532 F.2d 10 (7th Cir. 1976) (class action permitted in case involving open end credit where class readily ascertainable from defendant's records); *Tinsman v. Moline Beneficial Fin. Co.*, 531 F.2d 815 (7th Cir. 1976) (collateral described as "all of the consumer goods of every kind now owned or hereafter acquired by debtors in replacement" at debtor's residence held incompatible with U.C.C. § 9-204(2) and in violation of the Federal Truth in Lending Act).

<sup>154</sup>531 F.2d at 805.



## XVII. Taxation

*Thomas B. Allington\**

### A. Death Taxes

#### 1. Recodification

The 1976 General Assembly adopted a new codification of the inheritance and estate taxes, replacing Article 4 of Title 6 of the Indiana Code with a new Article 4.1.<sup>1</sup> The enactment was "intended to be a codification and restatement of applicable or corresponding provisions" of the laws repealed, without any substantive changes.<sup>2</sup> Organization and clarity of the statute are significantly improved.

#### 2. Deduction for Allowance to Surviving Spouse or Dependent Children

In one of two substantive amendments to the inheritance tax law, the list of deductions which may be taken from the value of property subject to the inheritance tax was expanded to include the \$8,500 allowance provided by Indiana Code section 29-1-4-1 to the surviving spouse or dependent children of a resident decedent.<sup>3</sup> While this allowance may be satisfied only from the probate estate, the amendment also provides that any portion of the deduction not needed to reduce to zero the inheritance tax value of probate property may be deducted from the value of nonprobate property transferred by the decedent to those entitled to the allowance.<sup>4</sup> If more than one person is entitled to the allowance, the deduction against the nonprobate property is to be divided equally among them.

If the probate estate is insufficient to satisfy the \$8,500 allowance in full, it is not entirely clear whether the difference

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<sup>1</sup>Act of Feb. 18, 1976, Pub. L. No. 18, §§ 1-2, 1976 Ind. Acts 69-104.

<sup>2</sup>*Id.* § 3, 1976 Ind. Acts 104.

<sup>3</sup>IND. CODE § 6-4.1-3-13(b)(10) (Burns Supp. 1976). The amendment is effective March 1, 1976, for inheritance taxes imposed on decedents dying after February 29, 1976. Act of Feb. 25, 1976, Pub. L. No. 20, § 3, 1976 Ind. Acts 108.

<sup>4</sup>IND. CODE § 6-4.1-3-14 (Burns Supp. 1976).

may be deducted from nonprobate property passing to individuals entitled to the allowance, or whether the deduction is limited to the amount actually passing through the probate estate. Although the statutory language lends itself to the latter construction, presumably the former result was intended since it would have the effect of equalizing the inheritance tax burden whether the surviving spouse or dependent children receive probate property under the allowance or nonprobate property which is otherwise subject to the tax. In any event, the amendment removes any possible doubt as to whether probate property passing to a surviving spouse or dependent children pursuant to the statutory allowance is exempt from the inheritance tax.<sup>5</sup>

### 3. *Exemption for Charitable Transfers*

The other noteworthy amendment<sup>6</sup> replaced provisions exempting certain charitable transfers with one stating that: "Each transfer described in section 2055(a) of the Internal Revenue Code is exempt from the inheritance tax." Thus, the exemption for charitable transfers is generally limited to the types of transfers which are deductible for federal estate tax purposes. While a full discussion of the transformation wrought by this amendment is beyond the scope of this survey, some comments on a few of the more striking changes are in order.

The classes of qualified recipients in section 2055(a)<sup>6</sup> are

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<sup>5</sup>The allowance in IND. CODE § 29-1-4-1 (Burns Supp. 1976) was proposed to the General Assembly by the Indiana Probate Code Study Commission, which stated in a comment that the allowance would be deductible for purposes of the inheritance tax, apparently as a claim against the estate. INDIANA PROBATE CODE STUDY COMMISSION, PROBATE REFORM ACT OF 1975, at 5 (Proposed Final Draft, 1974).

<sup>6</sup>In addition to the amendments discussed in the text, Act of Feb. 25, 1976, Pub. L. No. 19, § 2, 1976 Ind. Acts 105-06 added IND. CODE § 6-4.1-9-1.5 (Burns Supp. 1976), providing that any inheritance tax imposed under *id.* § 6-4.1-7-6 as a result of a change in the fair market value of the decedent's assets in the final determination of federal estate taxes is due 30 days after the notice of final determination of the federal estate tax is received, with interest accruing at the rate of 6 percent annually after such due date.

<sup>7</sup>IND. CODE § 6-4.1-3-1 (Burns Supp. 1976). Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74-76, enacting and codifying Ind. Code §§ 6-4.1-3-2 to -4 was also repealed by Act of Feb. 25, 1976, Pub. L. No. 9, § 3, 1976 Ind. Acts 106. See text accompanying notes 10-15 *infra*. The amendment and repealer are effective July 1, 1976, with respect to transfers made by individuals dying after June 30, 1976. [References to Ind. Code in roman type are to those sections which were codified but later repealed].

<sup>8</sup>Before amendments enacted by the Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1307(d), 1313(b), 1902(a), and 2009(b), 90 Stat. 1520 (1976), Int. Rev. Code of 1954, § 2055(a), provided as follows:

For purposes of the tax imposed by section 2001, the value of

generally broader than those described in the repealed sections.<sup>9</sup> For example, section 2055(a) (1) includes transfers to the United

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the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise, or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for the filing of the estate tax return)—

(1) to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes;

(2) to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office;

(3) to a trustee or trustees, or a fraternal society, order, or association operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no substantial part of the activities of such trustee or trustees, or of such fraternal society, order, or association, is carrying on propaganda, or otherwise attempting, to influence legislation, and such trustee or trustees, or such fraternal society, order, or association, does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office; or

(4) to or for the use of any veterans' organization incorporated by Act of Congress, or of its departments or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

For purposes of this subsection, the complete termination before the date prescribed for the filing of the estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

<sup>9</sup>An exception, however, is a nonprofit cemetery corporation not owned by a church or municipality, which was recognized as a qualified transferee under the former statute in *IND. ADMIN. R. & REGS. ANN. Rule (6-4-1-3) -3* (Burns 1976), but which has been held not to qualify under I.R.C. § 2055(a). See *Child v. United States*, [1976] *FED. TAXES EST. & GIFT (P-H)* (38 Am. Fed. Tax Rep. 2d) ¶148,104 (2d Cir. Aug. 19, 1976); *Rev. Rul. 67-170, 1967-1 CUM. BULL. 272*.

States, any state or territory thereof, any political subdivision of the foregoing, and the District of Columbia, and section 2055(a) (4) covers transfers to veterans' organizations incorporated by Act of Congress and their local chapters and posts. The repealed statute exempted only transfers to municipal corporations of Indiana,<sup>10</sup> and to "public institutions."<sup>11</sup> In addition, section 2055 (a) (3) includes transfers to trusts and certain fraternal organizations if they are required to use such contributions solely for charitable and related purposes, whereas the prior Indiana law exempted such transfers only if the transferee was *organized* for charitable or related purposes,<sup>12</sup> or if the transfer was to a trust for the sole benefit of such an organization.<sup>13</sup> The new act also eliminates the prior law's restrictions on how much of the property or income therefrom must be used for charitable or related purposes in the state of Indiana as opposed to out-of-state localities,<sup>14</sup> as well as the requirement of reciprocity for transfers to organizations in other states.<sup>15</sup> On the other hand, except for governments or qualified veterans' organizations, section 2055(a) disqualifies transferees who engage in a substantial way in propaganda or lobbying activities, or who participate or intervene in any political campaign on behalf of a candidate for public office. These disqualifications were not previously imposed under the inheritance tax.

Since the amendment adopted only subsection (a) of section 2055, it does not include the disallowance in section 2055(e) (1) of transfers to certain private foundations and nonexempt trusts<sup>16</sup>

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<sup>10</sup>Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(1).

<sup>11</sup>Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(2).

<sup>12</sup>Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(4).

<sup>13</sup>Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74, enacting and codifying Ind. Code § 6-4.1-3-1(3).

<sup>14</sup>Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 74-75, enacting and codifying Ind. Code § 6-4.1-3-2.

<sup>15</sup>Act of Feb. 18, 1976, Pub. L. No. 18, § 1, 1976 Ind. Acts 76, enacting and codifying Ind. Code § 6-4.1-3-4.

<sup>16</sup>Section 2055(e) (1) disallows a deduction for transfers to:

- (1) private foundations which incur liability for the tax on termination of private foundation status [*see* I.R.C. §§ 507(a) and (c), 508(d) (1)];
- (2) private foundations and nonexempt trusts unless the governing instrument requires an appropriate minimum distribution of income each year and prohibits self-dealing, retaining excess business holdings, making investments which jeopardize charitable purposes, and making certain taxable expenditures [*see* I.R.C. §§ 508(d) (2), 508(e), 4941-47]; and

or the limitations found in section 2055(e) (2) requiring an annuity trust, unitrust, or pooled income fund arrangement where interests in property are split between charitable and noncharitable beneficiaries.<sup>17</sup> It is possible, therefore, that some transfers will qualify for the inheritance tax exemption even though they are not deductible under the federal estate tax.<sup>18</sup> Apparently the legislature did not wish to utilize the inheritance tax to discourage the abuses which led Congress to enact the limitations in section 2055(e) for the federal estate tax.

A peculiarity of the amendment is its failure to specify whether it refers to section 2055(a) as in effect at a particular date. By contrast, another section of the death tax statute defines the term "federal death tax credit" by reference to sections 2011 and 2102 of the Internal Revenue Code of 1954 "as amended and in effect on January 1, 1976."<sup>19</sup> Such a limitation on the incorporation by reference of a provision of the federal statute is commonly used to avoid any problem of unconstitutional delegation of legislative authority.<sup>20</sup> Consistent with general principles of incorporation by reference, and in order to avoid unconstitutionality, the statute should be interpreted as referring to section 2055(a) as amended and in effect on the date the amendment to state law was adopted.<sup>21</sup> Thus, subsequent amendments to section 2055(a) by Congress

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(3) foreign organizations with substantial support from foreign sources which engage in certain prohibited transactions [see I.R.C. § 4948].

<sup>17</sup>Section 2055(e) (2) (A) generally disallows a deduction for a remainder interest transferred to a qualified charity unless the interest is in a charitable remainder annuity trust or unitrust [defined in I.R.C. § 664], or a pooled income fund [defined in I.R.C. § 642(c) (5)]. This limitation does not apply, however, to a remainder interest, not in trust, in a personal residence or farm, or to an interest, not in trust, which is an undivided portion of the decedent's entire interest in property.

Section 2055(e) (2) (B) disallows a deduction for the transfer of any other partial interest in property to a qualified charity unless the interest is in the form of a guaranteed annuity or fixed percentage distributed yearly of the fair market value of the property, whether or not such interest is in trust.

<sup>18</sup>Conversely, the inheritance tax exemption would not apply to the peculiar situation where a deduction is allowed under § 2055(b) (2) if a bequest is made by the decedent in trust to an octogenarian surviving spouse for life subject to a power of appointment which the spouse exercises in favor of a qualified charity.

<sup>19</sup>IND. CODE § 6-4.1-1-4 (Burns Supp. 1976).

<sup>20</sup>IND. CONST. art. 4, § 1, vests the legislative authority of the state in the General Assembly.

<sup>21</sup>The amendment was adopted on February 25, 1976, but the effective date was July 1, 1976. Act of Feb. 25, 1976, Pub. L. No. 19, § 4, 1976 Ind. Acts 106.

would not be included without further action by the General Assembly.<sup>22</sup>

## B. Income Taxes

### 1. Gross Income Tax—Exemptions

Prior to an amendment enacted in 1971, Indiana Code section 6-2-1-7(i) provided for exemption from the gross income tax of "gross income received by churches . . . hospitals . . . or any corporation organized and operated solely for the benefit of any of the same . . . ." <sup>23</sup> The term "hospital" was not defined. In *State v. Bethel Sanitarium, Inc.*,<sup>24</sup> the state contended that a nursing home was not exempt because it did not fall within the definition of "hospital" for licensing purposes under Indiana Code section 16-10-1-6. Since the statute limited this definition to the chapter on hospital licensing and regulations, however, the First District Court of Appeals held that it was not controlling for tax purposes. Rather, the court decided that the term "hospital" for purposes of the tax statute should be given its usual and ordinary meaning, which is any institution for the reception and care of sick, wounded, infirm, or aged persons. Alternatively, the court found that the exemption of Bethel could be upheld on the ground that it was a corporation organized and operated solely for the benefit of the Seventh Day Adventist Church. While acknowledging that incidental benefits flowed to the patients of Bethel, the court felt that it was sufficient that any financial benefits inured to the church.

Indiana Code section 6-2-1-7(i) was extensively revised in 1971<sup>25</sup> and subsection (i) (3) now specifically limits the exemption for hospitals to those licensed by the Indiana State Board of Health. Furthermore, reference is no longer made to corporations organized and operated solely for the benefit of other charitable organizations. At the same time, however, a more general exemption was included in subsection (i) (1) for institutions, organizations and not-for-profit corporations organized and operated exclusively for charitable and related purposes. The court noted, therefore, that an institution like Bethel could still qualify for exemption under subsection (i) (1) even though it is not now entitled to exemption under (i) (3) as a hospital.

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<sup>22</sup>See, e.g., the amendments to section 2055(a) in the Tax Reform Act of 1976, Pub. L. No. 94-455, §§ 1307(d), 1313(b), 1902(a), and 2009(b), 90 Stat. 1520.

<sup>23</sup>Ch. 117, § 6(1), 1937 Ind. Acts 616, as amended, IND. CODE § 6-2-1-7(i) (Burns Supp. 1976).

<sup>24</sup>332 N.E.2d 808 (Ind. Ct. App. 1975).

<sup>25</sup>Compare IND. CODE § 6-2-1-7(i) (Burns 1972) with *id.* (Burns Supp. 1976).

## 2. *Adjusted Gross Income Tax—Criminal Offenses*

In *State v. Moles*,<sup>26</sup> the Third District Court of Appeals considered the proper county of jurisdiction and venue for the criminal offenses under Indiana Code section 6-3-6-11 of making a false and fraudulent tax return, making a false statement in a tax return, and swearing to or verifying a false and fraudulent statement in a tax return. The defendants prepared their income tax returns in Lake County and filed them with the State Department of Revenue in Marion County. Indictments were returned by the Marion County Grand Jury, but the Marion County Criminal Court transferred the cases to the Lake County Criminal Court,<sup>27</sup> which granted motions to quash the indictments on the ground they charged offenses committed outside the jurisdiction of the Marion County Grand Jury. The court of appeals held that both jurisdiction and venue lay in Marion County and ordered that the cases be transferred back to the Marion County Criminal Court.

In finding that the alleged offenses were committed in Marion County, the court construed "making" a tax return to mean "filing" the return and concluded that a filled-in tax form does not become a "return" until it is filed. The opinion quoted approvingly from a federal case<sup>28</sup> which reached the same conclusions with respect to similar statutory language in section 7206(1) of the Internal Revenue Code of 1954.<sup>29</sup> The court of appeals felt that any defect in a tax return does not become material until the return is filed and therefore taxpayers are entitled to a "right of self-correction" if they should decide not to file false returns after they are completed and signed. It was also pointed out that a contrary interpretation could defeat enforcement of the statute where returns are prepared and signed outside the state.

Under the federal statute, however, the courts have generally concluded that making a return is a continuous act occurring in any place where some part of the return is prepared as well as the place where it is filed.<sup>30</sup> Accordingly, prosecution is permitted

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<sup>26</sup>337 N.E.2d 543 (Ind. Ct. App. 1975).

<sup>27</sup>The transfer was made pursuant to IND. CODE § 35-1-38-2 (Burns 1975) [superseded by *id.* § 35-1.1-2-6 (Burns 1975)], which provided for transfer to the proper county where it appeared a defendant had been prosecuted in a county not having jurisdiction of an offense.

<sup>28</sup>United States v. Gilkey, 362 F. Supp. 1069, 1071-72 (E.D. Pa. 1973).

<sup>29</sup>*Cf.* United States v. Habig, 390 U.S. 222 (1968); Butzman v. United States, 205 F.2d 343 (6th Cir.), *cert. denied*, 346 U.S. 828 (1953); United States v. Horowitz, 247 F. Supp. 412 (N.D. Ill. 1965). *Contra*, United States v. Wyman, 125 F. Supp. 276 (W.D. Mo. 1954).

<sup>30</sup>*See* United States v. Bettenhausen, 499 F.2d 1223 (10th Cir. 1974); United States v. Lawhon, 499 F.2d 352 (5th Cir. 1974), *cert. denied*, 419 U.S. 1121 (1975); United States v. Slutsky, 487 F.2d 832 (2d Cir. 1973); United



in any district where any part of the offense took place.<sup>31</sup> The opinion in *Moles*, on the other hand, implies that trials under the Indiana statute are proper only in the county where the tax return is filed, i.e., Marion County. Defendants residing in other counties may therefore be put to the hardship of producing witnesses and otherwise defending themselves in Marion County. While it is sensible to require that filing is a necessary element of the offense of "making" a false tax return, it does not follow that preparation of the return is not also part of the offense. It should be permissible to prosecute in the county where preparation of a false return took place as well as in the county where it was filed. Moreover, where prosecution is begun in the county of filing, a change of venue to the county where the return was prepared should be permitted if it appears to be the better forum in which to try the case.<sup>32</sup>

### 3. *Credit for Investments in Neighborhood Assistance Programs in Impoverished Areas*

A new income tax credit was enacted for investments in certain neighborhood assistance programs in impoverished areas, either directly or by contributions to neighborhood organizations.<sup>33</sup> The credit is allowed for physical improvement of impoverished areas, job training and education of individuals not employed by the person or firm claiming the credit, crime prevention, counseling, emergency assistance, medical care, housing, and recreational facilities.<sup>34</sup> An "impoverished area" is any area in Indiana certified as such by the State Department of Public Welfare,<sup>35</sup> and the Administrator of Public Welfare must approve the program to be conducted, the amounts to be invested therein, and the plans for implementation.<sup>36</sup>

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*States v. Hagan*, 306 F. Supp. 620 (D. Md. 1969); *cf.* *Kowalsky v. United States*, 290 F.2d 161 (5th Cir. 1961); *United States v. Gross*, 276 F.2d 816 (2d Cir.), *cert. denied*, 363 U.S. 831 (1960); *Newton v. United States*, 162 F.2d 795 (4th Cir. 1947), *cert. denied*, 333 U.S. 848 (1948); *United States v. Goldberg*, 206 F. Supp. 394 (E.D. Pa. 1962), *aff'd*, 330 F.2d 30 (3d Cir.), *cert. denied*, 377 U.S. 953 (1964).

<sup>31</sup>However, 18 U.S.C. § 3237 (1970) permits the defendant to elect to be tried in the district in which he resided at the time the alleged offense was committed under I.R.C. § 7206(1), if it involved use of the mails and prosecution is begun in a judicial district other than the one in which the defendant resides.

<sup>32</sup>*Cf.* *United States v. United States District Court*, 209 F.2d 575 (6th Cir. 1954).

<sup>33</sup>IND. CODE §§ 6-3-3.1-1 to -7 (Burns Supp. 1976).

<sup>34</sup>*Id.* §§ 6-3-3.1-1 to -3.

<sup>35</sup>*Id.* § 6-3-3.1-1(b).

<sup>36</sup>*Id.* § 6-3-3.1-3.

The amount of the credit allowable for any taxable year is basically the lesser of \$25,000 or 50 percent of the difference between the amount invested or contributed and the amount of any reduction or savings in the taxpayer's federal income tax attributable to the investment or contribution.<sup>37</sup> However, the total credit allowable among all taxpayers in any one state fiscal year is limited to \$1,000,000.<sup>38</sup> Taxpayers desiring to claim the credit must file an application with the State Department of Revenue before the investment or contribution is made.<sup>39</sup> Applications will then be approved by the department in the chronological order of filing in the state fiscal year up to the \$1,000,000 maximum.<sup>40</sup> Within thirty days after receiving notification that an application has been approved, the applicant is required to submit proof that the amount to be claimed as a credit has been paid or permanently set aside in a special account to be used solely for the approved program or purpose.<sup>41</sup> Once the \$1,000,000 maximum has been reached in any one state fiscal year, no further applications filed in that year may be approved except to the extent of amounts previously approved for applicants who fail to file the required proof of payment within the prescribed thirty-day period.<sup>42</sup> If an applicant so requests, however, the department may approve an application, in whole or in part, with respect to the next succeeding state fiscal year.<sup>43</sup> Such approval would apparently give the

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<sup>37</sup>*Id.* § 6-3-3.1-4. Although the reference in subsection (c) of this section is to "any reduction of savings in the federal income tax" (emphasis added), presumably it was intended to read "any reduction or savings" in federal taxes. Furthermore, the literal language of subsection (c) provides for taking federal tax savings into account only in the case of a "business firm," whereas subsection (a) allows a credit equal to 50 percent of the amount invested by a "business firm or person." It is unclear, therefore, whether federal tax saving must be taken into account in figuring the amount of the credit for a taxpayer other than a "business firm." In any event, subsection (b) further limits the credit to a maximum of \$25,000 in any taxable year of the taxpayer. No provision was made in the statute for a refund or carryover of the credit to the extent it exceeds the amount of income taxes due in any year.

<sup>38</sup>IND. CODE § 6-3-3.1-6 (Burns Supp. 1976).

<sup>39</sup>*Id.* § 6-3-3.1-5. At this writing, the Indiana Department of Revenue has not yet prescribed the forms and procedures to be used in applying for and claiming the credit.

<sup>40</sup>*Id.* § 6-3-3.1-6.

<sup>41</sup>*Id.* § 6-3-3.1-5. This section states that the Department of Revenue "may" disallow the credit if proof of payment is not filed within the 30-day period, but it is apparently not required to do so.

<sup>42</sup>*Id.* § 6-3-3.1-6.

<sup>43</sup>*Id.* The requirement that proof of payment be submitted within 30 days after notification that an application has been approved applies only where the credit is allowable in the same fiscal year of the state as the one in which the application is filed. *Id.* § 6-3-3.1-5. The statute is silent as to

taxpayer priority with respect to the \$1,000,000 limitation over applications filed in the succeeding fiscal year. It would generally be in the best interest of the taxpayer, therefore, to request such approval rather than relying on a resubmission of the application in the next state fiscal year.

Although credit applications are to be approved with respect to the state's fiscal year, a credit is allowable to a taxpayer only for the taxable year in which the investment or contribution is paid or permanently set aside.<sup>44</sup> The credit is available against any tax due under the gross income tax,<sup>45</sup> the adjusted gross income tax,<sup>46</sup> or the corporate supplemental net income tax.<sup>47</sup>

#### 4. Motor Fuel Tax Credit

Taxpayers entitled to a refund of motor fuel taxes under Indiana Code section 6-6-1-22(b) now have the option to claim the refund as a credit on their state income tax returns.<sup>48</sup> To receive either the refund or the credit, the taxpayer must submit a verified statement accompanied by original invoices and declaring that the purchases of fuel were not for use in operating motor vehicles on public highways of the state.<sup>49</sup> The credit that may be claimed on an income tax return is limited to the motor fuel taxes paid during the taxable year for which the return is filed.<sup>50</sup> If the credit exceeds the amount of the taxpayer's income tax liability for the year, he is entitled to a refund of the excess.<sup>51</sup>

#### 5. Occupation Income Tax Changes

The 1975 Indiana General Assembly enacted the Occupation Income Tax Law to permit taxation of occupation income by certain local governmental entities.<sup>52</sup> The law provides that a county council, common council, or board of trustees may adopt an ordinance to impose an annual 1.5 percent tax on occupation income

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whether or when proof of payment must be submitted if an application is approved with respect to the fiscal year succeeding the one in which the application is filed. In this situation, however, the credit apparently cannot be allowed until such succeeding state fiscal year.

<sup>44</sup>*Id.* § 6-3-3.1-7.

<sup>45</sup>*Id.* §§ 6-2-1-1 to -36 (Burns Supp. 1976) and *id.* §§ 6-2-2-1 to -3-1 (Burns 1972).

<sup>46</sup>*Id.* §§ 6-3-1-1 to -7-4 (Burns 1972 & Supp. 1976).

<sup>47</sup>*Id.* §§ 6-3-8-1 to -6 (Burns Supp. 1976).

<sup>48</sup>*Id.* § 6-3-3-7. The law is effective for income tax years beginning after December 31, 1975. Act of Feb. 11, 1976, Pub. L. No. 352, § 3, 1976 Ind. Acts 7.

<sup>49</sup>IND. CODE § 6-6-1-22(b) (Burns Supp. 1976).

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* § 6-3-3-7(d).

<sup>52</sup>Act of Apr. 26, 1975, Pub. L. No. 63, 1975 Ind. Acts 512.

received by an employee who is principally employed in a taxing subdivision.<sup>53</sup> Occupation income is defined to include "wages, salaries, fees, or commissions received for services performed in this state."<sup>54</sup> A taxpayer is entitled to a credit against his occupation income tax liability in an amount equal to the lesser of his state adjusted gross income tax liability or his occupation income tax liability.<sup>55</sup>

The enactment of the 1975 law was greeted with mixed reactions. Only five counties and one city adopted ordinances to impose the occupation income tax for calendar year 1976,<sup>56</sup> and the State of Kentucky unsuccessfully challenged the constitutionality of the tax on the ground that it was a retaliatory measure aimed at Kentucky residents working in Indiana.<sup>57</sup> Subsequent to this suit, the Department of Revenue issued a circular showing that an Indiana resident could also be subject to the occupation income tax if his deductions in arriving at his adjusted gross income tax liability reduced that liability to a lesser amount than his occupation income tax liability.<sup>58</sup>

The legal controversy surrounding this tax led to the adoption of two clarifying amendments and one new provision by the 1976 Indiana General Assembly: (1) A definition of the term "political subdivision" was added;<sup>59</sup> (2) reference in the law to the state adjusted gross income tax liability was clarified to allow credit only for an individual's Indiana adjusted gross income tax liability;<sup>60</sup> (3) a new provision was added permitting an Indiana county, city, or town imposing the occupation income tax to enter into a reciprocal agreement with political subdivisions of other states.<sup>61</sup> This agreement could exempt an out-of-state political subdivision's residents working in an adopting county, city, or town from the occupation income tax if a like exemption from a tax imposed by the out-of-state locality was afforded to Indiana residents employed there.

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<sup>53</sup>IND. CODE § 6-3.5-3-2 (Burns Supp. 1976).

<sup>54</sup>*Id.* § 6-3.5-3-1(1) and (2).

<sup>55</sup>*Id.* § 6-3.5-3-6.

<sup>56</sup>The five counties are Clark, Dearborn, Jay, Perry, and Randolph. The only city adopting the tax was New Albany.

<sup>57</sup>Kentucky *ex rel.* Baker v. Indiana, Cause No. 6069 (Jefferson Cir. Ct., Oct. 22, 1975).

<sup>58</sup>Circular OT-1 (November 17, 1975).

<sup>59</sup>IND. CODE § 6-3.5-3-1(8) (Burns Supp. 1976).

<sup>60</sup>*Id.* § 6-3.5-3-6.

<sup>61</sup>*Id.* § 6-3.5-3-4.5.

### C. Sales and Use Taxes

#### 1. Exemptions

In *Indiana Department of State Revenue v. American Dairy of Evansville, Inc.*,<sup>62</sup> a case which drew some incredibly fine lines, the First District Court of Appeals held that the exemption from the sales and use taxes for "fungicides, insecticides and other tangible personal property to be directly used in the direct production of food and commodities"<sup>63</sup> is applicable to insecticides, insect spray, bird repellent, and cleaning compounds used by a dairy in and around its processing plant to maintain a production environment conforming to state health standards. Although the Second District Court of Appeals had previously held in *Indiana Department of State Revenue v. RCA Corp.*<sup>64</sup> that air conditioning equipment installed to maintain environmental conditions conducive to the manufacture of color television picture tubes and component parts was not "directly used" in "direct production," the court in *American Dairy* decided that since the statute referred to items such as fungicides and insecticides, the use of which generally has an immediate impact upon the production environment rather than upon the product itself, these items qualified for the exemption. While cleaning compounds are not specifically enumerated in the statute, they were also found to be exempt since their use in this case to retard the growth of harmful bacteria was functionally similar to the use of fungicides.

It is easy to agree with this reasoning so far as insecticides and fungicides are concerned, but it is difficult to reconcile the decision that cleaning compounds are also exempt with the earlier case holding that air conditioning equipment is not exempt. Continuing to try to walk this tightrope, however, the court in *American Dairy* held that cleaning equipment used by the dairy was not exempt. Noting only that the impact of such equipment on the production process was arguably less direct than that of the cleaning compounds, the court fell back on the principle of strict construction of the exemption against the taxpayer in cases of ambiguity. At the same time, exemptions were upheld for refrigeration equipment, ice, and dry ice used in the production plant to maintain the physical integrity of the dairy products during processing.<sup>65</sup> It was decided that these items operated directly on the dairy products during the production process and the exemp-

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<sup>62</sup>338 N.E.2d 698 (Ind. Ct. App. 1975).

<sup>63</sup>IND. CODE § 6-2-1-39(b) (1) (Burns 1972).

<sup>64</sup>310 N.E.2d 96 (Ind. Ct. App. 1974).

<sup>65</sup>These items were found to be exempt under one or more of the exemptions in IND. CODE § 6-2-1-39(b) (1), (6) and (10) (Burns 1972).

tion was not limited to items actually incorporated into the final product. Finally, the court held that the exemptions for items "directly used" in "direct production" do not apply to items used in distributing finished goods to purchasers after completion of the production process. Accordingly, exemption was denied for wire and plastic milk cases used in delivering dairy products to purchasers<sup>66</sup> and for electricity consumed in storing finished goods.<sup>67</sup> An exemption was allowed, however, for milk cans used in the production process.

*RCA* and *American Dairy* have launched the Indiana courts on a never ending course of deciding exemptions under the sales and use tax on the basis of "attenuated subtleties."<sup>68</sup> Since the statute does not limit exemptions to items actually incorporated into a final product and since various items are enumerated which normally have only an indirect impact on the final product itself, exemptions should generally be allowed for any items which serve a function similar to those enumerated. It makes no sense to exempt fungicides and insecticides used to control a production environment while subjecting "other tangible personal property" similarly used to a higher standard. In this regard, the courts have jumped to strict construction of the exemption against the taxpayer without first seeking to resolve ambiguities in a manner consistent with the overall scheme of the statute.

## 2. Collection Allowance

Beginning January 1, 1977, retail merchants other than public utilities<sup>69</sup> are allowed to keep a portion of the sales and use taxes collected by them and otherwise timely remitted to the state.<sup>70</sup> The allowance, which is designed to compensate merchants for collecting and timely remitting the taxes, phases in over a period of four years starting at one-fourth percent of the taxes on returns for 1977 and increasing each year thereafter by an additional one-fourth percent to an allowance of one percent after 1979.

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<sup>66</sup>It was also found that the milk cases were not "returnable containers" entitled to exemption under IND. CODE § 6-2-1-39(b)(2) (Burns 1972).

<sup>67</sup>Exemption of the electricity was denied under IND. CODE § 6-2-1-38(c) (Burns 1972), which exempts electricity used in "production" but does not contain the words "direct" or "directly." *But see* State v. Farmers Tankage, Inc., 144 Ind. App. 392, 246 N.E.2d 409 (1969) (transportation equipment used to gather raw materials before actual production process began was exempt under an earlier version of the statute, Ch. 232, § 7(b)(1), 1965 Ind. Acts 570, which did not include the words "direct" or "directly").

<sup>68</sup>The term is from the opinion of Justice Holmes in *Lucas v. Earl*, 281 U.S. 111, 114 (1930).

<sup>69</sup>Described in IND. CODE § 6-2-1-38(c), (d) and (e) (Burns 1972).

<sup>70</sup>*Id.* § 6-2-1-49(c) (Burns Supp. 1976).

### *D. Intangibles Tax*

#### *1. Low Income Individuals*

Overriding the Governor's veto of a bill originally passed in 1975, the General Assembly enacted an exemption from the intangibles tax for individuals whose "household income" for a taxable year does not exceed \$10,000, effective January 1, 1976.<sup>71</sup> If an intangible is owned jointly with one or more persons who do not meet the income test, the exemption applies to a portion of the value of the property based on the ratio of qualifying owners to the total number of owners.<sup>72</sup>

The act adopts the definition of household income provided in Indiana Code section 6-3-3-6(a)(1) and (2) for purposes of the "circuit breaker" credit for disabled and elderly persons under the adjusted gross income tax. Household income is defined therein as the combined income of an individual and his or her spouse if they are residing together. In addition to their adjusted gross income for income tax purposes there is included the amount of capital gains excluded from adjusted gross income, the amount of any pension or annuity (including Social Security benefits) excluded from adjusted gross income, support money, cash public assistance and relief, tax exempt interest on government obligations, workmen's compensation, "loss of time" insurance benefits, and any other type of income not included in adjusted gross income. The only exclusions are surplus food and other relief in kind supplied by a governmental agency and gifts from nongovernmental sources.

It should be possible under this provision for high income taxpayers to avoid the intangibles tax by transferring ownership of intangibles to related family members, such as children, who qualify as low income individuals.<sup>73</sup> It must be remembered, however, that "household income" apparently includes gifts from nongovernmental sources, so the \$10,000 limit might be exceeded in the year of the transfer if the transfer itself is taken into account. Moreover, the exemption might not apply to intangibles transferred to a trust, even if the beneficiary is a low income individual, since the taxpayer in that case is the fiduciary<sup>74</sup> (unless the trust is revocable or amendable by the grantor, in which case the grantor is considered to be the owner and taxpayer<sup>75</sup>). It

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<sup>71</sup>*Id.* § 6-5-3.5-1.

<sup>72</sup>*Id.* § 6-5-3.5-2.

<sup>73</sup>In Circular IN-27 (July 1, 1976), the Department of Revenue ruled that a transfer to a minor must be irrevocable to be recognized for purposes of the exemption.

<sup>74</sup>*See* IND. CODE § 6-5-1-1(d), (e), and (h) (Burns 1972).

<sup>75</sup>*See id.* § 6-5-1-1(j).



makes little sense, however, to base the exemption on the income of the fiduciary. Since the intangibles tax is essentially imposed on beneficial ownership and rights and privileges arising therefrom,<sup>76</sup> allowance of the exemption arguably should turn on whether the beneficial owner of the property is a low income individual. Some support for this approach may be derived from the provision requiring apportionment of the exemption in the case of jointly owned property on the basis of the number of joint owners who qualify as low income individuals. In addition, the exemption would apparently be available for intangibles held by a guardian or custodian for the benefit of a low income individual since the property would be reported on a return filed in the name of the individual for whom the property is held.<sup>77</sup> In the final analysis, it must be concluded that the amendment is ambiguous as to whether the exemption is to be allowed on the basis of beneficial ownership or on the basis of the duty otherwise to pay the tax.<sup>78</sup>

## 2. *Deposits in Credit Unions*

An exemption from the intangibles tax for deposits in federally chartered credit unions was enacted,<sup>79</sup> effective retroactively to January 1, 1975.<sup>80</sup> This amendment directly overturned the position taken by the Department of Revenue in Circular IN-22 issued on August 4, 1975 that such deposits would be subject to the intangibles tax starting January 1, 1975.<sup>81</sup> Deposits in credit unions organized under Indiana law were also exempted from the taxes imposed on banks and savings and loan associations, as well as the intangibles tax,<sup>82</sup> beginning January 1, 1976.<sup>83</sup> Such deposits

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<sup>76</sup>See *id.* § 6-5-1-2.

<sup>77</sup>Intangibles are required to be reported in conjunction with the taxpayer's state income tax return. *Id.* § 6-5-1-11. If an individual is unable to file an income tax return, it must be filed by his or her agent, committee, guardian, fiduciary, or other person charged with the care of the person or property of such individual. *Id.* § 6-3-4-2(b).

<sup>78</sup>By contrast, IND. CODE § 6-5-2-1 (Burns 1972) exempts intangibles "owned by or held for the use and benefit of" religious and charitable institutions, and *id.* § 6-5-3-1 exempts property "held" in pension, profit sharing, and stock bonus trusts exempt under the federal income tax.

<sup>79</sup>IND. CODE § 28-7-1-32(3) (Burns Supp. 1976).

<sup>80</sup>Act of Feb. 18, 1976, Pub. L. No. 18, § 2(b), 1976 Ind. Acts 606.

<sup>81</sup>After the issuance of Circular IN-22, a class action suit was commenced by members of a federally chartered credit union. The court issued a preliminary injunction prohibiting the state from taxing deposits held by members in federal credit unions. *Jester v. Clark*, Cause No. S-775-1444 (Marion Co. Super. Ct., Dec. 22, 1975). Pursuant to the court's decision, the department's position was withdrawn in Circular IN-23 (Dec. 15, 1975).

<sup>82</sup>IND. CODE § 28-7-1-32(2) (Burns Supp. 1976).

<sup>83</sup>Act of Feb. 19, 1976, Pub. L. No. 124, § 2(a), 1976 Ind. Acts 606.

had not previously been considered subject to the intangibles tax because they were subject to the deposit taxes imposed on savings and loan associations at the same rate as the intangibles tax. The effect of these changes is to equalize the treatment of deposits in state and federal credit unions by exempting both types from the intangibles tax and equivalent deposit taxes.<sup>64</sup> To this extent, credit unions are given an advantage over other banks and financial institutions which must pay taxes on their deposits to the state.

### *E. Property Tax*

#### *1. Easements*

In *Budnick v. Indiana National Bank*,<sup>65</sup> the First District Court of Appeals decided that an easement held by a pipeline company must be assessed separately from the remaining interest in the land. The issue arose when the land was sold for delinquent taxes and the new owner contended that the tax deed extinguished the easement. The court held that the tax deed could not convey more than the property interest with respect to which the taxes were delinquent, and if the easement was required to be assessed separately to the pipeline company it could not be considered as included in the tax sale where only the taxes of the land owner were delinquent. Although it was established that the full value of the land had actually been assessed to the land owner without any reduction for the value of the easement, the court construed the then-applicable statute taxing pipeline companies on "[a]ll property, including all rights, franchises, and privileges owned or used"<sup>66</sup> to require that the easement be separately assessed to the pipeline company. Moreover, since the statute required the assessed valuation of pipeline company property other than "land not con-

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<sup>64</sup>Federal credit unions themselves are exempted from state and local taxation by 12 U.S.C. § 1768 (1970).

<sup>65</sup>333 N.E.2d 131 (Ind. Ct. App. 1975).

<sup>66</sup>IND. CODE § 6-1-44-5 (Burns 1972). This section was repealed in 1975 when the property tax provisions of the Code were recodified in Article 1.1 of Title 6. Act of March 18, 1975, Pub. L. No. 47, § 4, 1975 Ind. Acts 466. Although the recodification was intended to be a restatement of the prior law, the language quoted in the text does not appear in the new codification. However, IND. CODE § 6-1.1-8-1 (Burns Supp. 1976) taxes "property owned or used by a public utility company," and *id.* § 6-1.1-8-10 provides for apportionment among taxing districts of the assessed valuation of a pipeline company's property other than certain tangible personal property and "real property which is not a part of a pipeline or *right of way* of the company." (emphasis added). Essentially, the court construed the former statute to require the easement to be included in the property assessed to the pipeline company, subject to apportionment among the taxing districts in which the company's pipelines were located.

stituting a part of the pipeline right-of-way" (and other than certain tangible personal property) to be apportioned by the State Board of Tax Commissioners among the taxing districts in which the company's pipelines were located,<sup>87</sup> it was concluded that only the State Board could assess the easement, and the local assessor lacked jurisdiction to assess the value of the easement to the land owner or to anyone else. By this reasoning, the court deduced that there were no delinquent taxes with respect to the easement and therefore the rights of the easement holder were not affected by the tax sale.

If this case properly construes the statute, it would appear that land owners should not be assessed for the value of easements held by others. But if the easement is property which must be apportioned by the State Board, as in the case of the pipeline company, then under the court's reasoning the local assessor may lack jurisdiction to determine the value of the easement to be excluded in assessing the land owner. The assessor would therefore have to obtain the value of the easement from the State Board in order to arrive at the residual value to be assessed to the land owner. Evidence introduced in *Budnick* indicates, however, that the State Board has been assessing pipelines only on the basis of the value of the pipe and not on the value of the easements associated therewith. Thus, the prospect of a real stalemate exists unless the local assessor may properly determine the residual value to be assessed to the land owner without regard to action by the State Board on the easement.

## 2. Leasehold Interests

In *Miller v. Bauer*,<sup>88</sup> the plaintiffs had sold their real estate in the Indiana Dunes area to the United States, retaining "lease-backs" consisting of the right to use and occupancy of improved property for noncommercial residential purposes for a term of twenty-five years or less. When property taxes on the residential improvements were thereafter assessed to the plaintiffs<sup>89</sup> they

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<sup>87</sup>IND. CODE § 6-1-44-11(8) (Burns 1972), now codified at *id.* § 6-1.1-8-10 (Burns Supp. 1976).

<sup>88</sup>517 F.2d 27 (7th Cir. 1975).

<sup>89</sup>IND. CODE § 6-1.1-10-1(a) (Burns Supp. 1976) provides:

The property of the United States and its agencies and instrumentalities is exempt from property taxation to the extent that this state is prohibited by law from taxing it. However, any interest in tangible property of the United States shall be assessed and taxed to the extent this state is not prohibited from taxing it by the Constitution of the United States.

IND. CODE § 6-1.1-10-37 (Burns Supp. 1976) provides:

If real property which is exempt from taxation is leased to

sought to enjoin collection of the tax and asked that the leasebacks be declared immune from local taxation.<sup>90</sup> The Seventh Circuit Court of Appeals affirmed dismissal of the complaint by the district court on the basis of a statute prohibiting federal courts from enjoining the assessment, levy, or collection of state taxes where a "plain, speedy and efficient remedy may be had in the courts" of the state.<sup>91</sup>

The appellate court was unpersuaded by the plaintiffs' argument that there was no "plain, speedy and efficient remedy" because Indiana law does not specifically allow a class action at the administrative appeals level.<sup>92</sup> Moreover, the court refused to entertain the notion that the tax was unconstitutional on the ground that the plaintiffs were mere instrumentalities of the federal government.<sup>93</sup> Rather it was correctly determined that the taxes were levied with respect to the leasehold interests retained by the plaintiffs and not upon property of the United States.

### 3. *Property in Interstate Commerce*

*Scheneman v. State Board of Tax Commissioners*<sup>94</sup> dealt with another situation in which a lease affected the taxable status of property. In this case the owner of a fleet of trucks had leased them to an interstate carrier for the purpose of transporting goods in interstate commerce. The First District Court of Appeals held that even though the owner himself was not an interstate carrier, he was entitled to have the assessed value of the property deter-

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another whose property is not exempt and the leasing of the real property does not make it taxable, the leasehold estate and appurtenances to the leasehold estate shall be assessed and taxed as if they were real property owned by the lessee or his assignee.

<sup>90</sup>The action was brought under 28 U.S.C. §§ 1331, 1343 (1970) and 42 U.S.C. § 1983 (1970).

<sup>91</sup>28 U.S.C. § 1341 (1970).

<sup>92</sup>The court noted that IND. CODE § 6-1-31-4 (Burns 1972), now codified in part at *id.* § 6-1.1-15-5 (Burns Supp. 1976), permits consolidation of appeals from the State Board of Tax Commissioners to the circuit or superior court, and IND. CODE §§ 6-1-26-5, -6, and -8 (Burns 1972), now codified at *id.* §§ 6-1.1-4-5 to -9 (Burns Supp. 1976), provide various procedures under which the State Board of Tax Commissioners may order a general reassessment of an entire township, parcel, or area.

<sup>93</sup>*Compare* *United States v. City of Detroit*, 355 U.S. 466 (1958) (tax properly imposed on property of the United States leased to a private party) and *Auga Caliente Bank of Mission Indians v. County of Riverside*, 442 F.2d 1184 (9th Cir. 1971), *cert. denied*, 405 U.S. 933 (1972) (tax properly imposed on lessees of Indian land), *with* *Department of Employment v. United States*, 385 U.S. 355 (1966) (Red Cross is an instrumentality of the United States and therefore immune from state unemployment taxes).

<sup>94</sup>340 N.E.2d 385 (Ind. Ct. App. 1976).

mined in accordance with an allocation formula provided in regulations of the State Board of Tax Commissioners for trucks licensed in Indiana and "held, possessed or controlled" by an interstate carrier.<sup>95</sup> Under the formula, only a proportionate amount of the value of an interstate fleet is subject to the tax, based on the ratio of the number of miles traveled in Indiana to total miles traveled. The court noted that interstate use by the lessee could result in taxation of the property in other states on a proportionate basis, raising a constitutional question whether the property could also be fully taxed in Indiana.<sup>96</sup> Since the allocation formula was specifically designed to avoid such multiple taxation, it was construed to apply to the interstate fleet without regard to ownership.

In *Whirlpool Corp. v. State Board of Tax Commissioners*,<sup>97</sup> an exemption for inventory goods allegedly manufactured, boxed, and stored in a warehouse for the purpose of transshipment to an out-of-state destination was upheld on the basis of assumed legislative acquiescence in prior actions by the State Board of Tax Commissioners.<sup>98</sup> After the Board had ruled in favor of the claimed exemption in 1965, Whirlpool continued to claim it in 1966, 1967, and 1968 without further challenge. When Whirlpool claimed the exemption in 1969, however, the Board ruled that the property was not exempt. The First District Court of Appeals overruled the latter decision on the assumption that the failure of the legislature to act after the prior administrative interpretation by the Board indicated acquiescence in the exemption, and therefore the Board was bound to adhere to its first interpretation. The court also held the Board had not acted to hold a hearing and make a final determination with respect to the assessment of the property within the limitation period prescribed in Indiana Code section 6-1-31-10.<sup>99</sup>

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<sup>95</sup>IND. ADMIN. R. & REGS. ANN. Rule (6-1.1-3-9) -72 (Burns 1976).

<sup>96</sup>See *Central R.R. v. Pennsylvania*, 370 U.S. 607 (1962). Compare *Braniff Airways, Inc. v. Nebraska State Bd. of Equalization*, 347 U.S. 590 (1954), with *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944).

<sup>97</sup>338 N.E.2d 501 (Ind. Ct. App. 1975). For a discussion of other issues in the case, see Shaffer, *Administrative Law*, *supra*.

<sup>98</sup>The exemption was claimed under IND. CODE § 6-1-24-5 (Burns 1972), now codified at *id.* § 6-1.1-10-30 (Burns Supp. 1976), which essentially provides an exemption to the extent the property is exempt under the commerce clause of the United States Constitution. See generally IND. ADMIN. R. & REGS. ANN. Rule (6-1.1-3-9) -32 (Burns 1976).

<sup>99</sup>Now codified at IND. CODE § 6-1.1-16-1 (Burns Supp. 1976). This statute provides that any change in assessment by the State Board of Tax Commissioners, including the final determination appeal from the County Board of Review, must be made and notice thereof given by October 1 of the year for which the assessment is made, or 16 months after the personal property

The statute provides that if the Board fails to act to change an assessment within the prescribed period, the assessed value claimed by the taxpayer on the personal property return is final.<sup>100</sup> Although a representative of the Board had conducted an audit of the taxpayer's return and his recommendation to disallow the claimed exemption had been adopted within the limitation period, the Board had also granted a further hearing to the taxpayer after expiration of the limitation period pursuant to a regulation permitting a hearing in the discretion of the Board if the taxpayer disagrees with the recommendation of a hearing officer and petitions for such a hearing before final assessment is made by the Board.<sup>101</sup> In these circumstances, the court decided that the audit was not a hearing and that the final action disallowing the exemption occurred after the formal hearing, which was too late.

#### 4. Valuation of Real Property

In determining the value of real property for taxation purposes, the statute prescribes a number of factors to be considered<sup>102</sup> and requires that all of these factors must be taken into account to the extent they are applicable.<sup>103</sup> In *State Board of Tax Commissioners v. Valparaiso Golf Club, Inc.*,<sup>104</sup> the Third District Court of Appeals decided that the Board acted arbitrarily when it valued a golf course solely on the basis of the use of the property without considering whether other factors might be relevant. While it is not necessary to use all of the factors listed in the statute in making every appraisal, the Board is required to determine which ones are applicable and then to use those factors in appraising the value of the property. The court of appeals also held that the trial court

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return is filed if it is filed after May 15 of the assessment year, whichever is later.

<sup>100</sup>The court found the longer limitation period of three years specified in the case of undervalued or omitted property in IND. CODE § 6-1-30-2 (Burns 1972), now codified at *id.* § 6-1.1-9-3 (Burns Supp. 1976), to be inapplicable. This longer period does not apply where the taxpayer files a return in substantial compliance with the statute and regulations of the State Board of Tax Commissioners. In addition, IND. CODE § 6-1-31-15 (Burns 1972), now codified at *id.* § 6-1.1-16-4 (Burns Supp. 1976), provides that in case of any conflict the shorter limitation period is controlling.

<sup>101</sup>IND. ADMIN. R. & REGS. ANN. Rule (6-1.1-3-9) -13 (Burns 1976).

<sup>102</sup>IND. CODE § 6-1-33-3 (Burns 1972), now codified at *id.* § 6-1.1-31-6 (Burns Supp. 1976).

<sup>103</sup>IND. CODE § 6-1-33-2 (Burns 1972), now codified at *id.* § 6-1.1-31-5 (Burns Supp. 1976). The recodification does not specifically include the requirement that all factors must be considered.

<sup>104</sup>330 N.E.2d 394 (Ind. Ct. App. 1975).

could not fix the value of property on an appeal from the Board, since the proper procedure is to remand the matter to the Board for reassessment.<sup>105</sup>

## XVIII. Torts

*James J. Brennan\**

The purpose of this discussion is to highlight selected judicial decisions in the area of tort law. Not all tort cases decided during the survey period have been discussed, but an effort has been made to note recent developments and significant clarifications and affirmations of Indiana law. Because this discussion is synoptic in nature, it does not purport to provide either extensive coverage or extensive analysis of the cases.

### A. Limitations on Duty

#### 1. The Guest Statute

The Indiana guest statute<sup>1</sup> withstood a vigorous equal protection challenge during the survey period. In *Sidle v. Majors*,<sup>2</sup> a guest passenger who was injured in an automobile driven by the defendant appealed the dismissal of her negligence complaint on the ground that the guest statute violated the fourteenth amendment to the United States Constitution and article 1, sections 12 and 23 of the Indiana Constitution. The Seventh Circuit Court of Appeals, before addressing the questions of federal law, certified the questions of state law to the Indiana Supreme Court pursuant to Rule 15(N) of the Indiana Rules of Appellate Procedure.

In an opinion couched with judicial restraint,<sup>3</sup> the supreme

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<sup>105</sup>See IND. CODE § 6-1.1-15-8 (Burns Supp. 1976); *Indiana State Bd. of Tax Comm'rs v. Pappas*, 302 N.E.2d 858 (Ind. Ct. App. 1973).

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The author wishes to express his appreciation to Lynn Brundage for her assistance in the preparation of this comment, and to J. Randall Aikman for his work in authoring the section on damages.

<sup>1</sup>IND. CODE § 9-3-3-1 (Burns 1973).

<sup>2</sup>536 F.2d 1156 (7th Cir.), certifying questions of state law to 341 N.E.2d 763 (Ind.), cert. denied, 97 S. Ct. 366 (1976). *Dempsey v. Leonherdt*, 341 N.E.2d 763 (Ind. 1976) was a companion case to *Sidle*. This case is also discussed in Marsh, *Constitutional Law*, *supra* at 133. For an analysis of *Sidle*, see 9 IND. L. REV. 885 (1976).

<sup>3</sup>341 N.E.2d 763 (Ind. 1976). The extent to which the supreme court acted with restraint is exemplified by the following excerpt from the opinion:



court, speaking through Justice Prentice, held that the guest statute bore a fair and substantial relationship to at least three perceived legitimate state interests: (1) The fostering of hospitality by insulating generous drivers from lawsuits instituted by ungrateful guests, (2) the elimination of the possibility of collusive lawsuits, and (3) protection of insurance companies and the public from the "benevolent thumb syndrome," a novel theory based upon the belief that jurors will assume that the real defendants in guest-host suits are insurance companies, and that juries will weigh their benevolent thumbs together with evidence of the host's negligence, all of which would result in increased insurance premiums.<sup>4</sup> For these reasons, the court concluded that it was not at liberty to substitute its judgment for that of the legislature, and held that the guest statute did not contravene article 1, sections 12 and 23 of the Indiana Constitution.

The Seventh Circuit Court of Appeals was not as charitable to the legislature's judgment when, after receiving the supreme court's ruling, it was presented with the question of whether the guest statute violated the fourteenth amendment to the United States Constitution.<sup>5</sup> Reviewing the constitutionality of the statute under the rational basis test,<sup>6</sup> the court found that each justification for the statute advanced by the Indiana Supreme Court was indefensible, and that *Silver v. Silver*,<sup>7</sup> a 1929 United States Supreme Court decision upholding the constitutionality of a guest statute, was invalid in light of changed social conditions. The purpose of fostering hospitality was not furthered by the guest statute, the court reasoned, because "widespread liability insurance

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In approaching a consideration of the constitutionality of a statute, we must at all times exercise self restraint. Otherwise, under the guise of limiting the Legislature to its constitutional bounds, we are likely to exceed our own. That we have the last word only renders such restraint the more compelling. We, therefore, remind ourselves that in our role as guardian of the constitution, we are nevertheless a court and not a "supreme legislature." We have no right to substitute our convictions as to the desirability or wisdom of legislation for those of our elected representatives. We are under a constitutional mandate to limit the General Assembly to its lawful territory of prohibiting legislation which, although enacted under the claim of a valid exercise of the police power, is unreasonable and oppressive. Nevertheless, we recognize that the Legislature is vested with a wide latitude of discretion in determining public policy.

*Id.* at 766.

<sup>4</sup>*Id.* at 768-72.

<sup>5</sup>536 F.2d 1156 (7th Cir.), *cert. denied*, 97 S. Ct. 366 (1976).

<sup>6</sup>"[S]tatutory classifications violate the Equal Protection Clause if they are not rationally related to 'some legitimate, articulated state purpose.'" *Id.* at 1157, *quoting from* McGinnis v. Royster, 410 U.S. 263, 270 (1973).

<sup>7</sup>280 U.S. 117 (1929).

has eliminated any notion of ingratitude that may have formerly adhered to a suit by a guest against his host."<sup>8</sup> Equally unimpressed by the so-called anti-collusion purpose of the statute, the court determined that, in fact, the statute encourages "odious perjury" and artfully drafted pleadings, and that any relationship that exists between the statute and the purpose of preventing collusive lawsuits "is so attenuated that it is unreasonable to eliminate causes of action of an entire class of persons merely because an indefinite portion of a designated class may file fraudulent lawsuits."<sup>9</sup> Finally, in apparent reference to the "benevolent thumb syndrome," the court concluded that "[d]efendant has not demonstrated that our invalidation of this statute would increase premiums for such insurance."<sup>10</sup>

Despite its considered view that the guest statute was an "anachronistic monument to the insurance industry" that bore no rational relationship to a legitimate state interest,<sup>11</sup> the court sustained the validity of the statute because two years ago the United States Supreme Court, in *Cannon v. Oviatt*,<sup>12</sup> summarily dismissed the appeal of a decision of the Utah Supreme Court upholding the constitutionality of a guest statute. In view of the Supreme Court's recent holding in *Hicks v. Miranda*<sup>13</sup> that summary dispositions of appeals are binding precedents upon lower courts, the Seventh Circuit held that it was bound by the summary affirmance of *Cannon* and was required to sustain the constitutionality of the guest statute.

The United States Supreme Court denied certiorari over the vigorous dissent of Justice Brennan, in which Justice Marshall joined.<sup>14</sup> Noting that the courts of no less than seventeen states have examined or reexamined their guest statutes over the past five years, and that almost one-half of those courts have deemed their states' guest statutes to be unconstitutional, Justice Brennan stated that "[t]his conflict of view might reasonably lead bench and bar to expect that this Court would grant review of a case that afforded an opportunity to reexamine [*Silver v. Silver*] in light of today's rationality standard."<sup>15</sup> He reasoned that:

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<sup>8</sup>536 F.2d at 1157.

<sup>9</sup>*Id.* at 1158.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.* at 1159.

<sup>12</sup>419 U.S. 810, *dismissing appeal for want of a substantial federal question*, 520 P.2d 883 (Utah 1974).

<sup>13</sup>422 U.S. 332 (1975).

<sup>14</sup>97 S. Ct. 366 (1976).

<sup>15</sup>*Id.* at 367.

[H]ad the Court foreseen that [*Hicks v. Miranda*] . . . would convert the [*Cannon v. Oviatt*] dismissal into an ironclad holding compelling the Court of Appeals in this case to abandon its own considered view of the merits, it seems probable that at the very least the Court, because of the doubts widely shared as to the continuing vitality of *Silver v. Silver*, would have given more thought to the propriety, even desirability, of a summary dismissal.<sup>16</sup>

The denial of certiorari, according to Justice Brennan, left undisturbed "a decision upholding a statute whose constitutionality is patently open to serious debate."<sup>17</sup>

## 2. Premises Liability

The common law rules of premises liability, like the guest statute, create a special privilege to be careless toward particular classes of persons. *Sidle v. Majors* made it clear that any reform of the guest statute must be legislative rather than judicial. This is not the situation, however, with the law of premises liability. The common law rules, which define a landowner's duty of care toward entrants according to whether the entrant is classified as a licensee, invitee or trespasser, are judge-made. The rules were created by judges at a time when the rules of negligence were new and ill-defined, and when the notion that a landowner was sovereign in his own domain was firmly rooted in our jurisprudence.<sup>18</sup> By erecting rigid rules of duty, the courts, viewing the emerging negligence doctrine with considerable distrust, reserved the exclusive power to protect landowners from juries whose members, as a general rule, belonged to "the class of potential visitors rather than to that of landowners."<sup>19</sup>

It can no longer be said that the interest of human safety must be subservient to the interest of property ownership. Since the landmark case of *Rowland v. Christian*<sup>20</sup> was decided by the California Supreme Court in 1968, an increasing number of jurisdictions have abolished the common law rules, and have required possessors, like other members of society, to exercise reasonable

<sup>16</sup>*Id.* at 368-69.

<sup>17</sup>*Id.* at 369.

<sup>18</sup>See F. BOHLEN, *STUDIES IN THE LAW OF TORTS* 163 (1926).

<sup>19</sup>Marsh, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. REV. 182, 185 (1953).

<sup>20</sup>69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). See generally Annot., 32 A.L.R.3d 508 (1970).

care in their daily pursuits.<sup>21</sup> New Hampshire,<sup>22</sup> Wisconsin,<sup>23</sup> and New York<sup>24</sup> joined this growing minority during the survey period.

A frequent criticism of the common law classification system, apart from its harshness and inflexibility, has been its proclivity to breed confusion in the law.<sup>25</sup> The courts have not been reluctant to attenuate the common law rules or to emasculate them with numerous exceptions in an effort to make them more consonant with the now well-settled rules of negligence and the emerging policy of the law to require all persons to behave reasonably. The law of Indiana, particularly with respect to cases involving licensees, is a paragon of this confusion.<sup>26</sup> Much judicial energy has been expended over the past several years in efforts to determine the duty of care owed to licensees in Indiana. The development of the law in this area, in the words of one Indiana jurist, "has been uneven, and characterized by confusing terminology such as 'active-passive', 'willful and wanton', 'attractive nuisance', 'inherently dangerous condition', and 'last clear chance'."<sup>27</sup>

The first serious effort to eliminate some of this confusion was undertaken by Judge Buchanan in *Fort Wayne National Bank v. Doctor*.<sup>28</sup> *Doctor* presented the sole question of the duty of care

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<sup>21</sup>See *Smith v. Arbaugh's Restaurant*, 469 F.2d 97 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 939 (1973); *Mile High Fence Co. v. Radovich*, 175 Colo. 537, 489 P.2d 308 (1971); *Pickard v. City of Honolulu*, 51 Hawaii 134, 452 P.2d 445 (1969); *Mounsey v. Ellard*, 297 N.E.2d 43 (Mass. 1973); *Peterson v. Balach*, 294 Minn. 161, 199 N.W.2d 639 (1972); *Ouellette v. Blanchard*, 364 A.2d 631 (N.H. 1976); *Scurti v. City of New York*, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976); *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127 (R.I. 1975); *Antoniewicz v. Reszcynski*, 236 N.W.2d 1 (Wis. 1975).

The *Rowland* test was well stated in *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 133 (R.I. 1975):

Hereafter, the common-law status of an entrant onto the land of another will no longer be determinative of the degree of care owed by the owner, but rather the question to be resolved will be whether the owner has used reasonable care for the safety of all persons reasonably expected to be upon his premises. Evidence of the status of the invitee may have some relevance to the question of liability but it no longer will be conclusive. The traditional tort question of foreseeability will become important.

<sup>22</sup>*Ouellette v. Blanchard*, 364 A.2d 631 (N.H. 1976).

<sup>23</sup>*Antoniewicz v. Reszcynski*, 236 N.W.2d 1 (Wis. 1975).

<sup>24</sup>*Scurti v. City of New York*, 40 N.Y.2d 433, 354 N.E.2d 794, 387 N.Y.S.2d 55 (1976).

<sup>25</sup>See, e.g., *Mariorenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127 (R.I. 1975); J. PAGE, *THE LAW OF PREMISES LIABILITY* (1976).

<sup>26</sup>See generally Brennan, *Torts, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 340, 342-45 (1975); Note, *Premises Liability: A Critical Survey of Indiana Law*, 7 IND. L. REV. 1001 (1974).

<sup>27</sup>*Swanson v. Shroat*, 345 N.E.2d 872, 876 (Ind. Ct. App. 1976).

<sup>28</sup>149 Ind. App. 365, 272 N.E.2d 876 (1971).

owed to a licensee injured by a condition of the premises. Characterizing the law of Indiana pertaining to the licensee-licensor relationship as "snarled," the court overruled a line of cases holding that a possessor could be held liable to a licensee for active negligence and gross negligence, and concluded that liability would exist only for "positive wrongful acts," "entrapment," and "willful and wanton conduct."<sup>29</sup> *Doctor* represented the high-water mark of the common law rules in Indiana because the court concluded that each of these tests was aimed at conduct transcending negligence, and that the law of negligence was irrelevant to the licensee-licensor relationship.<sup>30</sup>

As might have been expected of a decision disregarding modern tort trends and professing a faithful adherence to the common law rules of premises liability, *Doctor* has not achieved its goal of clarifying Indiana law. In *Pierce v. Walters*,<sup>31</sup> the Third District Court of Appeals, without referring to *Doctor*, held that a possessor was liable to a child licensee for "willful and wanton negligence," a standard of care that defies definition.<sup>32</sup> Several years later, in *Surratt v. Petrol, Inc.*,<sup>33</sup> the First District Court of Appeals engaged in a thorough review of Indiana law and declined to follow *Doctor* to the extent that it held that a possessor could not be held liable to a known trespasser for negligent conduct. It is arguable, on the basis of *Pierce* and *Surratt*, that the law of negligence plays an important part in determining whether a possessor should be held liable to licensees injured by "active conduct."<sup>34</sup>

<sup>29</sup>*Id.* at 374-75, 272 N.E.2d at 882.

<sup>30</sup>*Id.*

<sup>31</sup>152 Ind. App. 321, 283 N.E.2d 560 (1972).

<sup>32</sup>*Id.* at 325, 283 N.E.2d at 562. "Wilfulness and negligence are diametrically opposite to each other." *Barrett v. Cleveland, C.C. & St. L. Ry.*, 48 Ind. App. 668, 671, 96 N.E. 490, 492 (1911). "[N]egligence and wilfulness are incompatible, and the former cannot be to such a degree as to become the latter." *Stauffer v. Schlegel*, 74 Ind. App. 431, 435, 129 N.E. 44, 46 (1920). "Negligence and wilfulness are as unmixable as oil and water. 'Willful negligence' is as selfcontradictory as 'guilty innocence.'" *Kelly v. Malott*, 135 F. 74, 76 (7th Cir. 1905). "To speak of 'willful negligence' is like talking of a 'black white' object." *Eldredge, Tort Liability to Trespassers*, 12 TEMPLE L.Q. 32, 33 (1937). See also Note, *Premises Liability*, *supra* note 26, at 1031.

<sup>33</sup>312 N.E.2d 487, *aff'd on rehearing*, 316 N.E.2d 453 (Ind. Ct. App. 1974).

<sup>34</sup>312 N.E.2d at 492, following RESTATEMENT (SECOND) OF TORTS § 336 (1965). See, e.g., *Scurti v. City of New York*, 40 N.Y.2d 433, 354 N.E.2d 794, 797, 387 N.Y.S.2d 55, 58 (1976). A major problem with the "active negligence" exception is that the distinction between active and passive negligence is highly artificial and often difficult to make. See James, *Tort Liability of Occupiers of Land: Duties Owed to Trespassers*, 63 YALE L.J. 145, 174-75 (1953); Brennan, *supra* note 26, at 346 (discussing *Surratt*). Compare *Lingenfelter v. Baltimore & O.S. Ry.*, 154 Ind. 49, 55 N.E. 1021 (1900) with *Midwest Oil Co. v. Storey*, 134 Ind. App. 137, 178 N.E.2d 468 (1961). The Indiana

The courts traditionally have found the common law rules of premises liability more palatable in cases in which a licensee was injured by a condition of the land rather than by active conduct of the possessor.<sup>35</sup> Thus, an even more significant erosion of *Doctor* occurred in the recent case of *Swanson v. Shroat*,<sup>36</sup> in which the strength of *Doctor* was considered in the context of an injury occasioned by a condition of the defendant's land. The plaintiff in *Swanson* was a ten-year-old boy who was injured when he fell from a tree located in the defendant's backyard. The trial court granted summary judgment for the defendant on the ground that the undisputed facts failed to bring the case within any of the exceptions enunciated in *Doctor*. The Second District Court of Appeals affirmed the trial court's decision, but for a different reason: the child was contributorily negligent as a matter of law because he should have known and appreciated the risks inherent in playing in a tree.<sup>37</sup> Before reaching this conclusion, however, the court engaged in an analysis of the law of premises liability—an analysis rendered unnecessary by the court's ultimate disposition of the case—that casts serious doubt upon the precedential value of *Doctor*.

Although the *Swanson* court cited various aspects of *Doctor* with apparent approval throughout its opinion,<sup>38</sup> the court's dissatisfaction with *Doctor* was obvious. Despite the effort made in *Doctor* to clarify Indiana law, the court noted that "the conduct which measures up to the requisite standard of care owed to a licensee remains unclear."<sup>39</sup> Engaging in an independent analysis of the authorities, the court noted that liability has traditionally

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Supreme Court has held, however, that there is no such thing as active negligence. *Indiana Harbor Belt R.R. v. Jones*, 220 Ind. 139, 41 N.E.2d 361 (1942).

<sup>35</sup>See *James*, *supra* note 34, at 158.

<sup>36</sup>345 N.E.2d 872 (Ind. Ct. App. 1976).

<sup>37</sup>Indiana courts have established rigid categories of conditions and structures the danger of which a child is expected, as a matter of law, to recognize and appreciate. *Id.* at 879. See, e.g., *Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953) (falling from heights); *City of Evansville v. Blue*, 212 Ind. 130, 8 N.E.2d 224 (1937); *Anderson v. Reith-Riley Constr. Co.*, 112 Ind. App. 170, 44 N.E.2d 184 (1942) (cave-ins of soil). A child injured by such a condition is barred from recovery unless it is shown that the danger was latent. *Lockridge v. Standard Oil Co.*, 124 Ind. App. 257, 114 N.E.2d 807 (1953). The rule operates harshly. Compare *id.* with *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950) (same pond involved in drowning deaths one year apart). The rule has been justly criticized. See Note, *Landowner's Liability for Infant Drowning in Artificial Pond*, 26 IND. L.J. 266 (1950). See also Note, *Premises Liability*, *supra* note 26, at 1020-21.

<sup>38</sup>345 N.E.2d at 877.

<sup>39</sup>*Id.* at 876.

been found to exist in cases in which a licensee was injured by a condition that he was unable to recognize or avoid. Because dangers that may be obvious to an adult are often hidden to a child, the court determined, on the basis of substantial precedent, that possessors must exercise a greater quantum of care toward child licensees.<sup>40</sup> For this reason, the court concluded that the trial court erred in relying upon *Doctor*, which was limited by its facts to an injury sustained by an adult licensee.

Having made this distinction, the court refocused its inquiry upon the duty of care owed to both child and adult licensees, and thus made the distinction one largely without a difference. Viewing the duty of care owed to licensees more broadly than would have been possible under a literal reading of *Doctor*, the court adopted the rule set forth in the *Restatement (Second) of Torts* section 342<sup>41</sup> for determining when a licensee can recover from a possessor for injuries brought about by a static condition of the premises. In obvious dissatisfaction with the present state of the law, the court stated that the *Restatement* "clearly and concisely" sets forth the circumstances in which a possessor may be held liable to a licensee, and provides a "coherent guide" for the determination of liability "without the confusing terminology which has prevailed in Indiana cases over the past 90 years."<sup>42</sup>

The impact of *Swanson* upon *Doctor* and the law of premises liability in general was best described in the concurring opinion of Judge Buchanan, the author of *Doctor*. He concluded that "[r]esort by the majority to the rule stated in section 342 of the *Restatement (Second) of Torts* as the basis for its opinion, represents a subtle transition from established Indiana law of non-host liability (with clearly defined exceptions) to a negligence standard . . . ."<sup>43</sup> Stating that this transition is "without authority or justification in the law of this State," Judge Buchanan would have affirmed the trial court's decision solely upon the basis of *Doctor*.<sup>44</sup>

Under the *Restatement* rule, a possessor is liable for injuries caused to licensees by conditions of the land when: (1) He knows or should know of the condition and should realize that it involves an unreasonable risk of harm, (2) he should expect that licensees will not realize or discover the danger, (3) he fails to exercise reasonable care to make the condition safe or warn of the condition and the risks involved, and (4) the licensees do not know

<sup>40</sup>*Id.* at 877. But see *Neal v. Home Builders, Inc.*, 232 Ind. 160, 111 N.E.2d 280 (1953). *Neal* was limited to its facts in *Swanson*. 345 N.E.2d at 878.

<sup>41</sup>RESTATEMENT (SECOND) OF TORTS § 342 (1965).

<sup>42</sup>345 N.E.2d at 878-79.

<sup>43</sup>*Id.* at 881.

<sup>44</sup>*Id.*



or have reason to know of the condition and the risk involved. The *Restatement* approach borrows heavily from the law of negligence and establishes a rule that is substantially more just than the rules enunciated in *Doctor*. There is one drawback, however, to making it a part of Indiana law. The *Restatement* continues to recognize the common law classifications of invitee, licensee, and trespasser, and thus will serve to perpetuate rather than eliminate this outmoded terminology.<sup>45</sup>

The most interesting aspect of Judge Sullivan's opinion in *Swanson* is his statement that "[i]t is believed that [plaintiff's] argument for the elimination of the distinction between invitees and licensees with respect to the duty owed by a landowner or occupant is meritorious."<sup>46</sup> Observing that the Indiana Supreme Court impliedly recognized the common law rules in *Hammond v. Allegretti*,<sup>47</sup> a case involving the duty of care owed to invitees, he concluded that it would be "presumptuous for [the court of appeals] to strike down the traditional distinction" and that reconsideration of this area of the law "is best left to our highest court in this case or in some future appeal in which, as here, the argument is squarely presented."<sup>48</sup>

There can be no doubt that the time has come for the supreme court to engage in a careful and forthright examination of the law of premises liability. Other than the landmark case of *Hammond v. Allegretti*,<sup>49</sup> in which the court made it clear that the duty of care owed to invitees was not to be diminished by arbitrary rules based upon the existence or nonexistence of particular circumstances, the court has not decided a premises liability case of any moment since 1962,<sup>50</sup> a year that predates the modern tort trend to abrogate the common law rules. The court's inattention to the law of premises liability has left this area clouded with uncertainty. How the court would rule if given the opportunity to modify or abrogate the common law rules cannot be predicted with any degree of certainty. But, as noted by Justice Prentice

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<sup>45</sup>See Hughes, *Duties to Trespassers: A Comparative Survey and Revaluation*, 68 YALE L.J. 633, 648-49 (1959); Note, *Premises Liability*, *supra* note 26, at 1047 n.264.

<sup>46</sup>345 N.E.2d at 875.

<sup>47</sup>311 N.E.2d 821 (Ind. 1974).

<sup>48</sup>345 N.E.2d at 875.

<sup>49</sup>311 N.E.2d 821 (Ind. 1974).

<sup>50</sup>*Pier v. Schultz*, 243 Ind. 200, 182 N.E.2d 255 (1962). Judge Sullivan concluded in *Swanson* that *Pier* only made a "casual reference to the standard of care owed to licensees . . . ." 345 N.E.2d at 878. *Pier* is significant for its holding in regard to the attractive nuisance doctrine applied to child trespassers. See Note, *Premises Liability*, *supra* note 26, at 1015-23.

in *Sidle v. Majors*,<sup>51</sup> the court has not been hesitant to abolish tort immunity doctrines when, "in [the court's] opinion, they were determined to be no longer compatible in our society." Other courts, when presented with this question, have concluded that, in today's society, "[a] man's life or limb does not become less worthy of protection by the law . . . because he has come upon the land of another without permission or with permission but without a business purpose."<sup>52</sup>

### 3. Sovereign Immunity

There has been much litigation concerning the parameters of the doctrine of sovereign immunity since all but a vestige of that doctrine was abrogated by the Indiana Supreme Court's 1972 decision in *Campbell v. State*.<sup>53</sup> This survey period has been no exception. All sovereign immunity cases decided during the survey period involved the status of the doctrine during the post-*Campbell*, pre-Indiana Tort Claims Act<sup>54</sup> transitional period. These decisions are important to the extent that they may be predictive of how Indiana courts will construe the provisions of the Tort Claims Act. Moreover, they are significant because it is likely that there are many cases pending, at least before the appellate courts, that will be controlled by *Campbell* and its progeny rather than the Tort Claims Act.

There are substantial differences between the common law under *Campbell* and the provisions of the Tort Claims Act.<sup>55</sup> It is very important, therefore, to determine whether or not a particular case will be controlled by *Campbell* and its progeny or the Tort Claims Act. In *State v. Daley*,<sup>56</sup> the Second District Court of Appeals held the \$300,000 damage ceiling of the Tort Claims Act could not be applied retrospectively to reduce a \$400,000 judgment obtained by plaintiff before the effective date of the Act. As a general rule, two questions must be resolved in the affirmative before a statute will be applied retrospectively: Does the legislature have the power to apply retrospectively a statutory provision, and, if so, did the legislature intend that the provision have retrospective effect?<sup>57</sup> The *Daley* court held that the legislature neither

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<sup>51</sup>341 N.E.2d 763, 770 (1976).

<sup>52</sup>*Rowland v. Christian*, 69 Cal. 2d 108, 118, 443 P.2d 561, 568, 70 Cal. Rptr. 97, 104 (1968).

<sup>53</sup>259 Ind. 55, 284 N.E.2d 733 (1972).

<sup>54</sup>IND. CODE §§ 34-4-16.5-1 to -18 (Burns Supp. 1976).

<sup>55</sup>See Foust, *Torts, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 264, 274-76 (1974).

<sup>56</sup>332 N.E.2d 845 (Ind. Ct. App. 1975).

<sup>57</sup>See Annot., 37 A.L.R.3d 1438, 1440 (1971).

intended nor had the constitutional power to limit the plaintiff's previously obtained judgment. Relying upon substantial precedent, the court determined that the plaintiff had a vested right by virtue of the judgment rendered by the trial court, and held that the legislature was prohibited by the Indiana Constitution from impairing such a right by the subsequent enactment of legislation.<sup>58</sup>

As an additional basis for its decision, the court applied the general rule of statutory construction that statutes are to be applied prospectively unless their language clearly indicates that they were intended to be retroactive,<sup>59</sup> and concluded that the language of the Tort Claims Act did not clearly indicate that the legislature intended the Act to be applied to judgments rendered before the Act's effective date. The court interpreted the loosely worded appropriations provisions of the Act to mean that appropriations had been made for the full satisfaction of past judgments.<sup>60</sup> Another reason exists for applying the Act prospectively which was not mentioned by the court. The Act contains an emergency clause that made it effective on the date of passage.<sup>61</sup> Had the legislature intended the Act to apply retrospectively, it would have been unnecessary to include the emergency clause. The inclusion of an emergency clause is strong evidence that a statute was intended to apply prospectively rather than retrospectively.<sup>62</sup>

The precise holding of *Daley* is that the damage limitation provisions of the Act cannot be applied retroactively to judgments obtained before February 19, 1974, the effective date of the Act. It is not entirely clear from the court's opinion whether the damage limitations of the Act are also inapplicable to causes of action that accrued before that date. This result would appear to be implicit in the court's holding that the legislature is not at liberty to deprive a person of a substantial portion of an existing vested right because it has long been recognized by the courts that an accrued cause of action is a vested right.<sup>63</sup> Thus, it would seem that the court's holding that the damage limitations apply only to

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<sup>58</sup>332 N.E.2d at 849.

<sup>59</sup>See *Malone v. Conner*, 135 Ind. App. 167, 189 N.E.2d 590 (1963); 73 AM. JUR. 2d *Statutes* § 350 (1974).

<sup>60</sup>332 N.E.2d at 847-48.

<sup>61</sup>Act of Feb. 19, 1974, Pub. L. No. 142, § 4, 1974 Ind. Acts. 599.

<sup>62</sup>See *Chadwick v. City of Crawfordsville*, 216 Ind. 399, 24 N.E.2d 937 (1940); 73 AM. JUR. 2d *Statutes* § 352 (1974).

<sup>63</sup>See *Baltimore & O.S. Ry. v. Reed*, 158 Ind. 25, 62 N.E. 488 (1902). See also *Stucki v. Loveland*, 94 Idaho 621, 495 P.2d 571 (1972); *Brennan v. Electrical Installation Co.*, 120 Ill. App. 461 (1905); *Minty v. State*, 336 Mich. 370, 58 N.W.2d 106 (1953). Procedural changes, however, do not substantially impair vested rights. *E.g.*, *Streepy v. State*, 202 Ind. 685, 177 N.E. 897 (1931).

"claims obtained" after February 19, 1974 refers to causes of action that accrue as well as judgments obtained after that date.<sup>64</sup>

Among the most significant provisions of the Tort Claims Act are those providing that a claim is barred unless notice is served upon the appropriate person or governing body within 180 days after the loss occurs.<sup>65</sup> Under pre-Tort Claims Act law, statutory notice was required in all suits brought against counties<sup>66</sup> and municipalities.<sup>67</sup> Until recently, there seemed to be no question that statutory notice requirements applicable to suits against governmental entities were constitutionally valid. Recent decisions of the Michigan<sup>68</sup> and Nevada<sup>69</sup> Supreme Courts declaring such provisions to be a denial of equal protection of the laws, however, have spawned an increasing number of constitutional challenges.<sup>70</sup> The constitutionality of Indiana Code section 18-2-2-1, which required written notice in suits brought against municipalities, was challenged in two cases decided by the appellate courts during the survey period.

In *Geyer v. City of Logansport*,<sup>71</sup> the Second District Court of Appeals pinioned its holding upon other grounds and found it unnecessary to pass on the constitutionality of the statute. In *Batchelder v. Haxby*,<sup>72</sup> however, the Third District Court of Appeals, in a 2-1 decision, held that the statute did not contravene the equal protection clause of the fourteenth amendment of the United States Constitution or article 1, section 23 of the Indiana Constitution. Judge Garrard, writing for the majority, concluded that governmental units are different from private tortfeasors, and stated, with little elaboration, that "we are unable to say the classification [discrimination resulting from the statute] does not rest upon any reasonable basis."<sup>73</sup> This holding is in accord with the First District Court of Appeals' holding in *Foster v.*

<sup>64</sup>The Act was amended in 1976 to change and add provisions concerning, among other things, the settlement of claims, the payment of defense costs and liability under federal civil rights laws. Act of Feb. 18, 1976, Pub. L. No. 140, 1976 Ind. Acts 687. The amendment provides that it is retroactive "to the full extent that it can be so applied constitutionally." *Id.* § 9, 1976 Ind. Acts at 693. The amendment also contains an emergency clause. *Id.* § 11, 1976 Ind. Acts at 693.

<sup>65</sup>IND. CODE § 34-4-16.5-6 (Burns Supp. 1976) (claims against state); *id.* § 34-4-16.5-7 (claims against political subdivisions).

<sup>66</sup>IND. CODE § 17-2-1-1 (Burns 1974).

<sup>67</sup>IND. CODE § 18-2-2-1 (repealed 1974) (replaced by Tort Claims Act).

<sup>68</sup>*Reich v. State Highway Dep't*, 386 Mich. 617, 194 N.W.2d 700 (1972).

<sup>69</sup>*King v. Baskin*, 89 Nev. 290, 511 P.2d 115 (1973).

<sup>70</sup>*See* Annot., 59 A.L.R.3d 93 (1974).

<sup>71</sup>346 N.E.2d 634, 642 (Ind. Ct. App. 1976).

<sup>72</sup>337 N.E.2d 887 (Ind. Ct. App. 1975).

<sup>73</sup>*Id.* at 889-90.

*County Commissioners*<sup>74</sup> that Indiana Code section 17-2-1-1, which requires notice in suits brought against counties, is constitutional. Judge Staton dissented in *Batchelder* and rejected the reasons advanced by the majority in support of the special protection afforded governmental tortfeasors by statutory notice provisions. He reasoned that "[a]ll tortfeasors have a similar interest in the prompt investigation of claims, in settlement, and in the preparation of a defense," and concluded that "[t]he special treatment afforded governmental tortfeasors, and the special burden placed upon victims of governmental negligence, are arbitrary and without rational basis and, therefore, violative of the equal protection guarantee."<sup>75</sup>

The notice provisions of the Tort Claims Act, in some respects, are more favorable to victims of governmental torts than the prior notice statutes. The time for filing notice is longer<sup>76</sup> and special allowances are made for minors and incompetents.<sup>77</sup> Unless the view taken by Judge Staton in his dissent in *Batchelder* is adopted by the supreme court at some later date, *Foster* and *Batchelder* strongly indicate that the notice provisions of the Tort Claims Act will pass constitutional muster.

If, as stated by Judge Garrard in *Batchelder*, the special status of governmental entities justifies the disparate treatment afforded victims of governmental torts, then it would hardly seem justifiable to require that statutory notice be served upon governmental employees who are sued in their individual capacities for torts committed in the course of their employment. In *Geyer*, the Second District, having additional grounds upon which to premise its decision, declined to decide whether a governmental employee could rely upon the lack of statutory notice as an affirmative defense to an action brought against him personally.<sup>78</sup> Nevertheless, the court noted the decision of the Seventh Circuit Court of Appeals in *England v. City of Richmond*,<sup>79</sup> in which it was held that, under Indiana law, a municipal employee cannot claim the benefit of the notice provision. A contrary holding would be indefensible in light of the rationale relied upon in *Batchelder* to justify the notice provision.

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<sup>74</sup>325 N.E.2d 223 (Ind. Ct. App. 1975).

<sup>75</sup>337 N.E.2d at 891.

<sup>76</sup>IND. CODE §§ 34-4-16.5-6 and -7 (Burns Supp. 1976) establish a 180-day period. *Id.* § 18-2-2-1 (repealed 1974) established a 60-day period, and *id.* § 17-2-1-1 (Burns 1974) contains no time period.

<sup>77</sup>*Id.* § 34-4-16.5-8 (Burns Supp. 1976). Minors are considered incompetents. Incompetents must file notice within 180 days after incompetency is removed.

<sup>78</sup>346 N.E.2d at 639.

<sup>79</sup>419 F.2d 1156 (7th Cir. 1969).

The statutory notice provisions of sovereign immunity statutes have fittingly been described as traps for the unwary.<sup>60</sup> At one time, Indiana courts demanded strict compliance with the pre-Tort Claims Act notice provision governing suits against municipalities. The leading case in this regard was *Touhey v. City of Decatur*,<sup>61</sup> in which the supreme court held that actual notice to a municipality through detailed newspaper coverage of the event giving rise to the claim was insufficient notice. The court based its decision on the erroneous premise that the liability of municipalities was statutory, and that there could be no liability unless the terms of the notice statute were strictly followed.<sup>62</sup> Later cases have recognized that municipalities are subject to liability under the common law, and that the notice requirement is merely a statutory limitation on the common law right to sue.<sup>63</sup>

The strength of the strict compliance doctrine enunciated in *Touhey* was slowly eroded in cases in which it was held that the form and content requirements of the statutory notice provision were satisfied by substantial compliance. In *Galbreath v. City of Indianapolis*,<sup>64</sup> the supreme court, relying upon its previous decision in *Aaron v. City of Tipton*,<sup>65</sup> rejected *Touhey* and applied the substantial compliance doctrine to a case in which the plaintiff failed to notify the appropriate government official. The basis of the court's holding was well stated by Justice Hunter: "The purpose of the notice statute being to advise the city of the accident so that it may properly investigate the surrounding circumstances, we see no need to endorse a policy which renders the statute a trap for the unwary where such purpose has in fact been satisfied."<sup>66</sup> Broadly read, *Galbreath* suggested that *Touhey* was no longer good law, and that strict compliance was not required in cases in which the plaintiff's error was harmless and the municipality was not prejudiced by less than strict compliance with the statute.<sup>67</sup>

Two cases decided during the survey period seem to have left open the question of how broadly *Galbreath* should be read. In *Batchelder v. Haxby*,<sup>68</sup> the Third District Court of Appeals, relying

<sup>60</sup>*Galbreath v. City of Indianapolis*, 253 Ind. 472, 479-80, 255 N.E.2d 225, 229 (1970).

<sup>61</sup>175 Ind. 98, 93 N.E. 540 (1911).

<sup>62</sup>*Id.* at 100-01, 93 N.E. at 541-42. See 46 IND. L.J. 428, 431 (1971).

<sup>63</sup>*Thompson v. City of Aurora*, 325 N.E.2d 839 (1975); 46 IND. L.J. 428, 430 (1971).

<sup>64</sup>253 Ind. 472, 255 N.E.2d 225 (1970).

<sup>65</sup>218 Ind. 227, 32 N.E.2d 88 (1941).

<sup>66</sup>253 Ind. at 479-80, 253 N.E.2d at 229 (emphasis added).

<sup>67</sup>See 46 IND. L.J. 428, 437 (1971).

<sup>68</sup>337 N.E.2d 887 (Ind. Ct. App. 1975).

upon *Touhey v. City of Decatur*,<sup>89</sup> held that knowledge acquired by a municipality independently of the plaintiff was insufficient notice under the statute. The court concluded that *Touhey* was still good law because "the statutory purpose of providing opportunity to investigate is not fully realized except when notice is had in the context that one is claiming municipal liability for injury."<sup>90</sup> The court did not disclose in its opinion whether the municipality, in fact, investigated the incident, or whether it was prejudiced by the plaintiff's failure to give formal notice. *Batchelder*, like the First District Court of Appeals' earlier holding in *Foster v. County Commissioners*,<sup>91</sup> indicates that there cannot be substantial compliance when formal written notice is not filed, and that the doctrine of substantial compliance primarily concerns a relaxing of statutory requirements pertaining to the form and content of notice and the public officials upon whom notice should be served.

A more liberal view of the doctrine of substantial compliance was taken by the Second District Court of Appeals in *Geyer v. City of Logansport*.<sup>92</sup> In *Geyer*, formal written notice was not given, but it was clear that the municipality had actual notice of the incident and a prompt investigation was conducted by county law enforcement officials and the insurance carrier of the municipality. The court criticized *Touhey*, and recognized that the *Touhey* court's holding that actual knowledge constituted insufficient notice has been seriously undermined by recent cases.<sup>93</sup> Judge Sullivan's well-reasoned opinion in *Geyer* indicates that a plaintiff who has not strictly complied with the notice requirements will not be denied a remedy unless the governmental entity is prejudiced, and that governmental entities will not be permitted to take refuge in the technicalities of the notice requirements when the purpose of those requirements, in fact, has been satisfied. *Batchelder* and *Foster* indicate a contrary result.

Another aspect of *Geyer* and *Batchelder* appears to be of significance to the practitioner. The *Geyer* court stated in a footnote that, although Indiana Code section 18-2-2-1 only required notice of the *occurrence*, the analogous provision of the Tort Claims Act requires notice of a claim.<sup>94</sup> Perhaps the court intended this to be a warning that, in future cases arising under the Tort Claims

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<sup>89</sup>175 Ind. 98, 93 N.E. 540 (1911).

<sup>90</sup>337 N.E.2d at 890.

<sup>91</sup>325 N.E.2d 223 (Ind. Ct. App. 1975).

<sup>92</sup>346 N.E.2d 634 (Ind. Ct. App. 1976).

<sup>93</sup>*Id.* at 642.

<sup>94</sup>*Id.* at 639 n.1, citing IND. CODE § 34-4-16.5-7 (Burns Supp. 1976). *But see* Thomann v. City of Rochester, 256 N.Y. 165, 176 N.E. 129 (1931).



Act, it will require that written notice specify, as the Act requires,<sup>95</sup> that a claim of liability is being asserted. If such is the case, mere notice of the occurrence will not be sufficient to constitute substantial compliance with the notice requirements of the Tort Claims Act. The Third District in *Batchelder* seemed to read the same strict requirement into Indiana Code section 18-2-2-1,<sup>96</sup> although as noted by the Second District in *Geyer*, that statute appears to require only notice of the occurrence. The Third District indicated in *Batchelder* that not only is a municipality entitled to notice of the occurrence, but it also is entitled to notice that the plaintiff, in fact, is claiming liability.

In *Board of Commissioners v. Briggs*,<sup>97</sup> the First District Court of Appeals undertook the task of interpreting *Campbell v. State*<sup>98</sup> "to delineate the bounds of protection . . . afforded to the State and its subdivisions by the doctrine of sovereign immunity [in pre-Tort Claims Act cases]."<sup>99</sup> The plaintiff in *Briggs* was injured when his motorcycle left the highway at a "Y" intersection that was not marked by warning signs. The evidence adduced at trial demonstrated that a warning sign had been erected by state officials, but it had fallen into a state of disrepair. Without deciding whether the initial decision to erect the warning sign was a discretionary act for which sovereign immunity would attach,<sup>100</sup> the court held, on the basis of substantial precedent, that "[o]nce the decision was made to place the signs at the intersection, the subsequent placement and maintenance of the signs was a purely ministerial act," the negligent performance of which would give rise to liability.<sup>101</sup>

In an effort to clarify existing law, the court concluded that the "last vestige" of sovereign immunity referred to in *Campbell* was dependent upon and coextensive with the personal immunities that traditionally have been conferred upon governmental entities and is to be determined under the doctrine of respondeat superior

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<sup>95</sup>IND. CODE § 34-4-16.5-9 (Burns Supp. 1976) requires, among other things, a short and plain statement of the amount of damages sought.

<sup>96</sup>337 N.E.2d at 890.

<sup>97</sup>337 N.E.2d 852 (Ind. Ct. App. 1975).

<sup>98</sup>259 Ind. 55, 284 N.E.2d 733 (1972). See Note, *Sovereign Immunity In Indiana—Requiem?* 6 IND. L. REV. 92 (1972); Foust, *supra* note 55, at 274-76.

<sup>99</sup>337 N.E.2d at 860.

<sup>100</sup>*Id.* at 863. Later in its opinion, however, the court indicated that a city was duty-bound to place warning signs at "inherently dangerous" intersections. *Id.* at 874. It would appear that a city has no discretion in this regard.

<sup>101</sup>*Id.* at 863, citing *Adams v. Schneider*, 71 Ind. App. 249, 255, 124 N.E. 718, 720 (1919).

in accordance with those standards.<sup>102</sup> The court reasoned that the *Campbell* court's failure to abrogate sovereign immunity in its entirety was a recognition that governmental entities should not be held liable in situations in which their employees are protected by personal immunities. Significantly, the court equated its holding with the tests of liability set forth in the Tort Claims Act.<sup>103</sup> Thus, prior case law regarding the personal immunities of governmental employees should be important precedents in cases arising under the Tort Claims Act.

The court further attempted to determine whether the "private duty" test referred to in *Campbell* was merely a restatement of the "ministerial-discretionary" test, or whether a plaintiff was required to prove both the breach of a private duty and the misperformance of a ministerial act to defeat the defense of sovereign immunity.<sup>104</sup> In an analysis abounding with circumlocution, the court concluded: (1) An act performed in furtherance of a public duty is usually considered a discretionary act,<sup>105</sup> (2) a governmental entity is immune only when its agents are shown to have been exercising their governmental discretion in the performance of a purely public duty,<sup>106</sup> (3) a governmental entity is not immune when its agents are shown to have breached a private duty, irrespective of whether the agents were engaged in acts committed to the discretion of their office,<sup>107</sup> and (4) the state is not immune in the present case because its agents negligently performed a ministerial act.<sup>108</sup> It would appear from this analysis that the private duty test and the ministerial-discretionary test are essentially interchangeable, and that the labels to be used will vary from case to case. Any distinctions between the tests are likely to be so fine-spun as to be unworkable. Fortunately, the Tort Claims Act speaks only of "discretionary functions."<sup>109</sup>

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<sup>102</sup>This approach previously had been suggested by the commentators. See Foust, *supra* note 55, at 274-75; Note, *Sovereign Immunity*, *supra* note 98. The court noted that governmental employees traditionally have been considered immune from liability when they are found to have been acting in good faith and within the scope of their authority while performing a discretionary function. 337 N.E.2d at 861.

<sup>103</sup>337 N.E.2d at 862-63, quoting from Foust, *supra* note 55, at 274-75.

<sup>104</sup>This question was initially raised in Foust, *supra* note 55, at 275.

<sup>105</sup>337 N.E.2d at 862.

<sup>106</sup>*Id.* The court emphasized the word "purely" and thus suggested that there are situations in which both a public and private duty exist.

<sup>107</sup>*Id.* at 862-63. The court emphasized that an act involving the exercise of discretion, as that word is commonly defined, is not necessarily a discretionary act in a legal sense. See W. PROSSER, *LAW OF TORTS* § 132, at 990 (4th ed. 1971).

<sup>108</sup>337 N.E.2d at 862. See note 101 and accompanying text.

<sup>109</sup>IND. CODE § 34-4-16.5-3(6) (Burns Supp. 1976).

It was also not clear from *Campbell* what the court meant by "private duty."<sup>110</sup> Addressing this question, the court in *Briggs* reasoned that the phrase was either a reference "to some general private duty test that must be met to escape the application of the sovereign immunity doctrine, or . . . to the specific duty that must be shown as a matter of law in every negligence case."<sup>111</sup> The court appears to have placed the latter interpretation on the private duty test. Concluding that "if there is any duty owed by the County in this case, it must be the common law duty to use reasonable care under all circumstances,"<sup>112</sup> the court held that:

[A] duty on the part of the County to use reasonable care in maintaining its streets and highways will arise whenever it can be shown that an intersection is inherently dangerous because of the absence of a warning sign, or when it can be shown that the county has foreclosed the issue of inherent danger by failing to maintain a sign that had previously been placed at the intersection . . . .<sup>113</sup>

A similar interpretation appears to have been placed upon the private duty test in *Elliott v. State*,<sup>114</sup> in which it was held that a private duty existed because the state had a "general duty to exercise reasonable care in the design, construction and maintenance of its highways . . . ."

Finally, in *City of Indianapolis v. Bates*,<sup>115</sup> the Second District Court of Appeals held that a municipality cannot be held liable under the doctrine of strict liability for injuries sustained by a plaintiff as a proximate result of a defective traffic signal. The

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<sup>110</sup>The *Campbell* court stated: "Therefore, it appears that in order for one to have standing to recover in a suit against the state there must have been a breach of a duty owed to a private individual." 284 N.E.2d at 737.

The *Briggs* court accurately observed that there is no easy way to define public and private duty. Earlier cases are not very helpful in this regard. In *Simpson's Food Fair, Inc. v. City of Evansville*, 149 Ind. App. 387, 272 N.E.2d 871 (1971), the court held that the duty to provide police protection was a public rather than private or special duty. In *Roberts v. State*, 307 N.E.2d 501 (Ind. Ct. App. 1974), the court held that public officials have a private duty to exercise reasonable care for the safety of prisoners, and in *Scott County School District v. Asher*, 312 N.E.2d 131 (Ind. Ct. App. 1974), the court held that school officials owed a private duty to exercise reasonable care for the safety of students using inherently dangerous shop equipment. No clear guidelines for differentiating public duties from private duties have emerged from these cases.

<sup>111</sup>337 N.E.2d at 862. See *Miller v. Griesel*, 308 N.E.2d 701, 706 (Ind. 1974).

<sup>112</sup>337 N.E.2d at 873.

<sup>113</sup>*Id.* at 874.

<sup>114</sup>342 N.E.2d 674, 676-77 (Ind. Ct. App. 1976).

<sup>115</sup>343 N.E.2d 819 (Ind. Ct. App. 1976).

plaintiff stipulated that the city had neither actual nor constructive knowledge that the signal was defective, which precluded recovery for negligence. The court carefully limited its holding to the facts, and declined to decide whether, in any circumstances, recovery could be premised upon the doctrine of strict liability.<sup>116</sup>

#### 4. Medical Malpractice

The two-year statute of limitations governing medical malpractice actions, under both the new medical malpractice act<sup>117</sup> and its predecessor special statute of limitations,<sup>118</sup> begins to run from the date of the physician's wrongful act or omission. The statute is carefully drafted to prevent the courts from extending the two-year period by applying the general rule of tort law that the statute of limitations does not begin to run until the date that a cause of action accrues, which may be long after the date of the wrongful act or omission.<sup>119</sup> It has been said that there are only two exceptions to the malpractice statute of limitations: the doctrine of fraudulent concealment and the grace period afforded minors because of their legal disability.<sup>120</sup> In view of the recent legislative effort to emasculate the latter exception,<sup>121</sup> the doctrine of fraudulent concealment has become the most important device for circumventing the statute.

The doctrine of fraudulent concealment is based upon the theory of equitable estoppel. It is a judge-made doctrine recognizing "that one who practices deceit or fraud, and conceals material facts and thereby prevents the discovery of the wrong, should not be permitted to take advantage of his own deceit or concealment by asserting the statute of limitations."<sup>122</sup> The doctrine had its

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<sup>116</sup>*Id.* at 822 n.2.

<sup>117</sup>IND. CODE §§ 16-9.5-3-1, -2 (Burns Supp. 1976) (within two years of negligent act or omission).

<sup>118</sup>*Id.* § 34-4-19-1 (Burns 1973) (within two years of act, omission or neglect).

<sup>119</sup>*See* Toth v. Lenk, 330 N.E.2d 336, 338 (Ind. Ct. App. 1975).

<sup>120</sup>*Id.* at 342 (concurring opinion).

<sup>121</sup>In *Chaffin v. Nicosia*, 261 Ind. 698, 310 N.E.2d 867 (1974), the supreme court held that the Indiana legal disability statute, IND. CODE § 34-1-2-5 (Burns 1973), applied to malpractice actions. *See* Foust, *supra* note 55, at 273-74. The new malpractice act, which was enacted after *Chaffin* was decided, provides that a child under the age of six may file suit any time before his eighth birthday. IND. CODE § 16-9.5-3-1 (Burns Supp. 1976). The clear intent of this provision is to nullify *Chaffin*. The constitutionality of this provision is subject to serious question. *See* Mallor, *A Cure for the Plaintiff's Ill?* 51 IND. L.J. 103, 116-17 (1975); Brennan, *supra* note 26, at 360-61 n.143; Note, *A Constitutional Perspective on the Indiana Medical Malpractice Act*, 51 IND. L.J. 143, 153 (1975).

<sup>122</sup>*Guy v. Schuldt*, 236 Ind. 101, 107, 138 N.E.2d 891, 894 (1956).

genesis in Indiana in *Guy v. Schuldt*.<sup>123</sup> The plaintiff in *Guy* alleged that a physician left a broken drill bit in his leg and negligently failed to disclose this condition during three years of treatment. The plaintiff discovered this condition eleven years after the physician-patient relationship terminated, and filed suit against the physician within two years of that date. The trial court sustained the defendant's demurrer to the complaint on the ground that the statute of limitations had run. Reversing this decision, the supreme court held that the fiduciary relationship between a physician and his patient imposes a duty upon the physician to disclose all material facts, and the failure to disclose such facts may constitute fraudulent concealment.<sup>124</sup> The court remanded the case with instructions to overrule the demurrer and give the plaintiff an opportunity to plead fraudulent concealment by way of reply.

In the recent case of *Toth v. Lenk*,<sup>125</sup> the Third District Court of Appeals considered the question of when a fraudulent concealment begins and ceases to toll the statute of limitations. The plaintiff suffered a hip injury and was treated for this condition by the defendant for approximately five months. Suspecting that his condition had not improved satisfactorily, he consulted two other physicians, and was advised by them that the defendant had improperly diagnosed the condition. Suit was filed less than two years from the date he consulted the last physician, but more than two years from the date of the alleged wrong. The Third District Court of Appeals rejected the plaintiff's contention that the statute would be unconstitutional unless it were construed to mean that it did not begin to run until actual discovery of the injury, and further declined to construe the statute as including an implied provision that the time period did not begin to run until plaintiff had a reasonable time to discover the injury.<sup>126</sup> By applying the doctrine of fraudulent concealment, however, the court achieved a result similar to that which would have been achieved had the latter construction been adopted.

The court held that a constructive fraud occurs when a physician fails to disclose to his patient that which he knows or in the exercise of reasonable care should know.<sup>127</sup> It would appear that,

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<sup>123</sup>*Id.*

<sup>124</sup>*Id.* at 107, 138 N.E.2d at 895. See generally Annot., 74 A.L.R. 1317 (1931); Annot., 144 A.L.R. 209 (1943); Annot., 80 A.L.R.2d 323 (1961); Annot., 80 A.L.R.2d 368 (1961).

<sup>125</sup>330 N.E.2d 336 (Ind. Ct. App. 1975).

<sup>126</sup>*Id.* at 338-39.

<sup>127</sup>*Id.* at 339. The court's use of the pronoun "that" apparently refers to "material information." See *Guy v. Schuldt*, 236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956).

under this analysis, the doctrine of fraudulent concealment requires neither an affirmative misrepresentation nor scienter, and that mere silence coupled with a duty to disclose will toll the statute of limitations. The logical import of the court's holdings is that fraudulent concealment will exist, at least during the period of treatment,<sup>128</sup> in every case involving a legitimate claim of malpractice because, as recognized by Judge Garrard, a physician who is guilty of negligence a fortiori "should have known" of the facts that he failed to disclose to his patient.<sup>129</sup> Although the constructive fraud theory is clearly a fiction, it has the significant effect of equating negligent concealment with fraudulent concealment.

Having established when a constructive fraud will begin to toll the statute, the court determined when the tolling effect will cease. In this regard, the court reasoned that a fraud can be considered to have been concealed only so long as the patient was unaware of it or was unable to discover it through the exercise of reasonable care. Reducing its holding to nonlegal terms, the court stated: "[W]here the patient knows or concludes that something is wrong in the diagnosis or treatment he has been given, he is chargeable as a matter of law with the additional knowledge he would have procured had he exercised diligence to discover it."<sup>130</sup> Applying this rule, the court held that the plaintiff possessed knowledge which, if pursued, would have led to the discovery of the defendant's negligence more than two years before suit was filed. The undisputed facts demonstrated that the plaintiff ceased relying upon the professional judgment of the defendant because he was convinced that he had not properly identified the condition or provided proper treatment.<sup>131</sup>

In dictum, the court noted that the termination of the physician-patient relationship will also cease the tolling effect of a fraudulent concealment.<sup>132</sup> This additional qualification stems from dictum in *Guy v. Schuldt*<sup>133</sup> that, once the physician-patient relationship ends, there is no longer a fiduciary relationship upon which to premise a duty to disclose, and mere silence cannot be a constructive fraud absent a duty to disclose. The court accepted this dictum without question, as did the Seventh Circuit Court of

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<sup>128</sup>See text accompanying notes 132-39 *infra*.

<sup>129</sup>330 N.E.2d at 339 n.3.

<sup>130</sup>*Id.* at 341. Under Judge Garrard's analysis, it is "knowledge of the injury rather than the reason for it" that destroys the estoppel. *Id.* at 340-41.

<sup>131</sup>*Id.* at 340. The court observed that "[u]ntil the patient learns something to the contrary he is entitled to rely upon the physician faithfully discharging his duty." *Id.* n.4.

<sup>132</sup>*Id.* at 339.

<sup>133</sup>236 Ind. 101, 109, 138 N.E.2d 891, 895 (1956).

Appeals in a previous case.<sup>134</sup> Under this analysis, the tolling effect ceases when the patient has actual or constructive notice of the injury, or when the physician-patient relationship ends, whichever event occurs first.<sup>135</sup>

In *van Bronckhorst v. Taube*,<sup>136</sup> however, the Second District Court of Appeals refused to apply the *Guy* dictum literally, and held that, at least in cases involving affirmative misrepresentations, the termination of the physician-patient relationship does not, as a matter of law, "commence the clock ticking on the statute of limitations."<sup>137</sup> The complaint in *van Bronckhorst* alleged that the defendant physician performed surgery on plaintiff's eye, and several weeks thereafter, he allegedly diagnosed plaintiff's condition as incurable glaucoma that would result in blindness within ten years. The physician allegedly advised the plaintiff that additional surgery could not be performed until blindness occurred, and that probably nothing could be done until that time. Dissatisfied with this diagnosis, the plaintiff consulted a second physician, who initially stated that plaintiff was suffering the adverse consequences of poorly performed surgery. Upon further consideration, however, he allegedly advised the plaintiff that the first physician's diagnosis and treatment were proper. Eight years later, the plaintiff was encouraged by a friend to seek an additional diagnosis. The third physician allegedly advised him, in effect, that he had been a victim of malpractice. Suit was filed against the first two physicians within two years of that date.

In a forthright and well-reasoned opinion, the Second District, per Judge Sullivan, held that the *Guy* court could not have meant what its dictum suggested because the case was remanded to give plaintiff an opportunity to plead fraudulent concealment approximately eleven years after the physician-patient relationship had terminated. Judge Sullivan reasoned that the clear implication of the remand order in *Guy* was that a fraudulent concealment can continue to toll the statute long after the physician-patient relationship ends. "To interpret *Guy* otherwise," he reasoned, "is to accuse our Supreme Court of knowingly sponsoring a needless waste of litigation expense and judicial time by remanding for further pleadings a complaint which no further pleadings could save."<sup>138</sup>

Having surmounted the *Guy* dictum, the court focused its inquiry upon the question of reasonable reliance as the touchstone

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<sup>134</sup>*Ostajic v. Brueckmann*, 405 F.2d 302 (7th Cir. 1968).

<sup>135</sup>330 N.E.2d 336, 342 n.2 (concurring opinion).

<sup>136</sup>341 N.E.2d 791 (Ind. Ct. App. 1976).

<sup>137</sup>*Id.* at 798.

<sup>138</sup>*Id.* at 797.



for determining when the tolling effect of a fraudulent concealment will cease. The determinative issue, the court reasoned, is "whether, and when, if at all, the patient had a reasonable opportunity to discover his condition so that reliance upon the representations of his former physicians became unreasonable."<sup>139</sup> Applying this rule, the court concluded that the defendants' alleged representations to plaintiff that his glaucoma was incurable were peculiarly capable of misleading him into avoiding further inquiry. Whether the plaintiff's reliance was unreasonable, the court held, is a question of fact for the jury.

*Toth* and *van Bronckhorst* are readily distinguishable because *Toth* involved a failure to disclose and *van Bronckhorst* involved affirmative misrepresentations.<sup>140</sup> *Van Bronckhorst* was surely decided correctly because affirmative misrepresentations are actionable as fraud irrespective of whether there exists a duty to speak arising from a fiduciary relationship.<sup>141</sup> It is interesting to note that the Third District declined to decide in *van Bronckhorst* whether the statute of limitations could continue to be tolled beyond the termination of the physician-patient relationship in a case involving the mere failure to disclose,<sup>142</sup> although the court could easily have resolved this question on the basis of *Guy* and *Toth*.

Neither *Toth* nor *van Bronckhorst* resolved the question of whether, in cases involving silence amounting to a fraudulent concealment, the entire physician-patient relationship must be terminated before the statute of limitations begins to run, or whether the termination of the relationship with respect to a particular medical problem is the critical events. The majority opinions in

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<sup>139</sup>*Id.* at 798. The holding in *van Bronckhorst* was phrased in terms of reliance, while the holding *Toth* was phrased in terms of knowledge. Perhaps this difference in semantics stems from the difficulty of proving reliance in cases like *Toth* that involve nondisclosure. It has been held in other areas of the law that reliance need not be shown in cases involving the nondisclosure of material facts. See *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972) (federal securities law).

<sup>140</sup>The *Toth* court expressly noted that "[t]here is no allegation of actual deliberate fraud," 330 N.E.2d at 340, although such was clearly the case in *van Bronckhorst*.

<sup>141</sup>PROSSER, *supra* note 107, § 106. The view that a fraudulent concealment ends with the termination of the physician-patient relationship has been criticized. See Note, *Malpractice and the Statute of Limitations*, 32 IND. L.J. 528, 539 (1957). Verbal silence does not always preclude a finding of active fraud. When a fiduciary represents by his conduct that he is faithfully performing his duties, such representations are considered active fraud if they were purposefully made to gain an undue advantage. See *United States v. Mandel*, 415 F. Supp. 997, 1009-10 (D. Md. 1976) (mail fraud).

<sup>142</sup>341 N.E.2d at 798.

both *Toth* and *van Bronckhorst* spoke broadly, although perhaps inadvertently, in terms of the entire relationship.<sup>143</sup> Judge Hoffman, concurring in *Toth*, carefully limited his statements to the termination of the relationship with respect to a particular medical problem.<sup>144</sup>

### B. Breach of Duty

The duty of care in negligence cases is always the same: both the plaintiff and the defendant must conform their conduct to the standard of reasonable care under the circumstances. Despite the supreme court's unequivocal declaration in *Hammond v. Allegretti*<sup>145</sup> that this duty should not be obfuscated by mechanical rules based upon the presence or absence of one particular circumstance, it has not been uncommon for lower courts to characterize factual questions that arise in negligence cases in terms of duty. For example, in *Thornton v. Pender*,<sup>146</sup> the First District Court of Appeals held that the trial court committed reversible error by declining to give a specific jury instruction on the duty of a motorist to maintain a lookout for bicycling children. This holding appears to be unduly mechanistic in light of the trial court's thorough jury instructions on the general rules of negligence and the statement to the jury that the plaintiff premised his contention of negligence, in part, on the failure of the defendant to maintain a lookout.<sup>147</sup>

Whether a motorist must maintain a lookout for bicycling children is not a question of duty, but rather it is a question of how a motorist must gauge his conduct to fulfill his duty to exercise reasonable care under the circumstances.<sup>148</sup> The duty of due care is as wide as all human behavior, and efforts to codify human behavior into mechanical rules of duty are destined to fail.<sup>149</sup> As noted by Dean Prosser, "the problems of 'duty' are sufficiently

<sup>143</sup>341 N.E.2d at 796-98; 337 N.E.2d at 339. Some courts have held that the contractual nature of the physician-patient relationship forms the basis of a continuing negligence theory by which the statute is tolled until the entire relationship is terminated. See Note, *Malpractice*, *supra* note 141, at 531. Other courts, using the same theory, have held that the statute is tolled until the date of the last negligent treatment. *Id.* Indiana courts have recognized the theory of continuing negligence in some situations. See *Montgomery v. Crum*, 199 Ind. 660, 161 N.E. 251 (1928). This theory was considered in *Toth*, but was rejected with regard to malpractice actions. See 330 N.E.2d at 340.

<sup>144</sup>330 N.E.2d at 347-48.

<sup>145</sup>311 N.E.2d 821 (Ind. 1974).

<sup>146</sup>346 N.E.2d 631 (Ind. Ct. App. 1976).

<sup>147</sup>*Id.* at 634.

<sup>148</sup>See, e.g., Foust, *supra* note 55, at 269.

<sup>149</sup>PROSSER, *supra* note 107, § 35, at 188.

complex without subdividing it [duty] in this manner to cover an endless series of details of conduct."<sup>150</sup> It is more properly said that the duty of reasonable care will require a motorist to maintain a lookout for children when he knows or should know that children are likely to be present in the area in which he is driving.

Indiana courts, like the courts of most jurisdictions, have demonstrated a proclivity for submitting the issue of contributory negligence or incurred risk to the jury whenever "enough uncertainty can be conjured up to make an issue as to what the reasonable man would have done"<sup>151</sup> under the circumstances. In cases in which a strong argument can be made that the plaintiff knowingly and intentionally exposed himself to the dangerous conduct of the defendant, the courts frequently have been confronted with the argument by defense counsel that, on the basis of the so-called "equal knowledge doctrine," a finding that the defendant was negligent a fortiori requires the finding that the plaintiff was contributorily negligent. The equal knowledge doctrine is premised upon the theory that when a plaintiff and defendant have equal knowledge and appreciation of a danger presented by the defendant's conduct, and each has an opportunity to take reasonable precautions, they are equally responsible for any resulting damage.<sup>152</sup> It has been applied in several Indiana cases to bar a plaintiff's recovery as a matter of law.<sup>153</sup>

The reluctance of the courts to invade the province of the jury, and the dubious precedential value of appellate court decisions holding that certain types of conduct constitute contributory negligence or incurred risk as a matter of law,<sup>154</sup> have led to much judicial effort to distinguish the "equal knowledge" cases from cases under consideration. During the previous survey period, the Third District Court of Appeals held that the equal knowledge doctrine was limited to situations in which both the plaintiff and the defendant were active participants in a dangerous activity.<sup>155</sup>

In the recent case of *Hi-Speed Auto Wash, Inc. v. Simeri*,<sup>156</sup> the Third District Court of Appeals placed additional limitations upon the doctrine by holding that it applies only to cases in which the

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<sup>150</sup>*Id.* § 53, at 324.

<sup>151</sup>*Id.* § 65, at 420.

<sup>152</sup>*Hi-Speed Auto Wash, Inc. v. Simeri*, 346 N.E.2d 607, 608-10 (Ind. Ct. App. 1976).

<sup>153</sup>*Hunsberger v. Wyman*, 247 Ind. 369, 216 N.E.2d 345 (1966); *Hedgecock v. Orlosky*, 220 Ind. 390, 44 N.E.2d 93 (1942); *Stallings v. Dick*, 139 Ind. App. 118, 210 N.E.2d 82 (1965).

<sup>154</sup>*See* PROSSER, *supra* note 107, § 35, at 188; *Brennan*, *supra* note 26, at 348.

<sup>155</sup>*Dreibelbis v. Bennett*, 319 N.E.2d 634 (Ind. Ct. App. 1974).

<sup>156</sup>346 N.E.2d 607, 610 (Ind. Ct. App. 1976).

plaintiff "was engaged in some act whereby, with respect to the defendant, he precipitated his own injury," and in which the record contains no evidence from which the jury could find that the plaintiff was entitled to assume that the defendant would exercise reasonable care.

The standard of reasonable care under the circumstances is generally an objective standard with respect to the mental capacity of the actor.<sup>157</sup> An important exception to this rule exists in cases involving children. The standard by which the reasonableness of a child's conduct is measured is the degree of care that would have been exercised under the circumstances by a child of like age, intelligence and experience.<sup>158</sup> This rule, like most rules of negligence, is readily translated into a jury instruction, and permits the jury, whose members usually have had a wide range of experience with children, to determine the subjective capacity of the individual child to recognize and appreciate unreasonable risks of harm, and to determine objectively how a reasonable and prudent child having like attributes would have behaved under the circumstances.<sup>159</sup>

A child has been defined as "a person of such immature years as to be incapable of exercising the judgment, intelligence, knowledge, experience and prudence demanded by the standard of the reasonable man applicable to adults."<sup>160</sup> In practice, a person over the age of sixteen rarely has been treated as a child, although the flexibility of the rule would not preclude such a result.<sup>161</sup> In *Moore v. Rose-Hulman Institute of Technology*,<sup>162</sup> however, the First District Court of Appeals appears to have held that whether a person is to be considered a child or adult in a negligence case is to be determined by reference to Indiana's legal disability statute, which defines an infant as a person under eighteen years of age.<sup>163</sup> The infinite variety of fact situations that can be expected to arise in negligence cases and the desirability of maintaining flexibility strongly militate against the establishment of a rule that requires trial courts to charge the jury on the standard of care applicable to children in every case in which the actor is under eighteen years of age. It will be unfortunate if *Moore* is read as establishing such a rule. There will be cases in which

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<sup>157</sup>PROSSER, *supra* note 107, § 32, at 154.

<sup>158</sup>*E.g.*, *Stewart v. Jeffries*, 309 N.E.2d 443 (Ind. Ct. App. 1974); PROSSER, *supra* note 107, § 32 at 155; RESTATEMENT (SECOND) OF TORTS § 283A (1965).

<sup>159</sup>PROSSER, *supra* note 107, § 32, at 155.

<sup>160</sup>RESTATEMENT (SECOND) OF TORTS § 283A, comment a (1965).

<sup>161</sup>*Id.*

<sup>162</sup>331 N.E.2d 462 (Ind. Ct. App. 1975).

<sup>163</sup>IND. CODE § 34-1-67-1 (Burns Supp. 1976).

a person under the age of eighteen should be treated as an adult, and cases in which a person over the age of eighteen should be treated as a child.<sup>164</sup> The courts should not be bound by fixed rules laid down in advance without regard to the facts of the particular case under consideration.

### C. Proximate Cause

In *State v. Dwenger*<sup>165</sup> the plaintiff was injured by a defective surface condition of a bridge that was negligently designed and constructed by agents of the State of Indiana. The proof adduced at trial demonstrated that agents of the state routinely inspected the bridge, at least for structural defects, but that no effort had been made by them to cure the defective condition. A jury verdict was returned for the plaintiff, and the state appealed on the ground that, *inter alia*, the City of Indianapolis had a duty to maintain the surface of the bridge, and its breach of that duty was sufficient intervening cause that superseded any negligence of the state to cause the plaintiff's injury.

Rejecting this contention, the Second District Court of Appeals held that the defective surface condition and the consequent injury to plaintiff were foreseeable results of the negligent manner in which the state designed and constructed the bridge. The court further held that, assuming the city had a duty to maintain the surface of the bridge, its failure to so "was not an intervening cause that interrupted or turned aside the natural sequence of events' resulting from" the state's negligence.<sup>166</sup> No mention was made by the court of the foreseeability of the city's intervening negligence.

*Dwenger* is in accord with the *Restatement* and majority view that "[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability . . . ."<sup>167</sup> Thus, the foreseeability of an intervening cause

<sup>164</sup>Some courts have established rigid rules based upon the multiples of seven contained in the Bible for determining when a child is capable of negligence. See PROSSER, *supra* note 107, § 65, at 155-56. Indiana courts at one time expressed this view. See *Bottorff v. South Constr. Co.*, 184 Ind. 221, 110 N.E. 977 (1915); *Kent v. Interstate Pub. Serv. Co.*, 97 Ind. App. 13, 168 N.E. 465 (1932); Note, *Contributory Negligence of Children In Indiana: Capacity and Standard Of Care*, 34 IND. L.J. 511 (1959). See *Harris v. Indiana General Service Co.*, 206 Ind. 351, 189 N.E. 410 (1934) (18-year-old with mental age of 6).

<sup>165</sup>341 N.E.2d 776 (Ind. Ct. App. 1976).

<sup>166</sup>*Id.* at 779.

<sup>167</sup>RESTATEMENT (SECOND) OF TORTS § 442B (1965); PROSSER, *supra* note 107, § 44 at 286. But see *Indiana Service Corp. v. Johnston*, 109 Ind.

is not significant when the force operates to change the circumstances surrounding a plaintiff's injury, but produces a result within the scope of the risk created by the defendant's conduct. This rule is premised upon the belief that it is only a slight extension of the defendant's responsibility "to hold him liable when the danger he has created is realized through external factors which could not be anticipated."<sup>168</sup> In occasional cases, the courts have held that the passage of time between the original negligence and the intervening negligence was sufficient to shift responsibility from the first wrongdoer to the second.<sup>169</sup> This approach was not considered in *Dwenger*, although a substantial period of time appears to have elapsed between the time the bridge was designed and constructed by the state and the time of the plaintiff's injury.

In the majority of situations, reasonable foreseeability remains the touchstone of proximate cause, and a foreseeable intervening cause will not supersede a defendant's negligence and relieve him of liability. Thus, in *Childs v. Rayburn*,<sup>170</sup> the defendant was held liable for the death of an employee who was struck by lightning while working in the defendant's open field. The defendant contended on appeal that the lightning bolt was unpredictable, and that his failure to foresee it and take precautions against it could not have been the cause of his employee's death. The evidence was conflicting, but several persons who were working near the field at the time in question testified that they saw and heard an approaching storm.<sup>171</sup>

After engaging in a general discussion of liability for injuries brought about by acts of God, the Third District Court of Appeals held that the defendant's permitting his employee to remain in an open field, unprotected from the pending storm, could have been considered the "immediate proximate cause" of death.<sup>172</sup> The court's use of the phrase "immediate proximate cause" is unfortunate because the concept of proximate cause is confusing enough without the addition of excess baggage. Apart from its semantics, however, *Childs* is concordant with the general rule that the duty of reasonable care sometimes requires one to anticipate unusual weather conditions, and the failure to do so may be negligence when it has created or increased an unreasonable risk of harm to someone within the scope of the duty.<sup>173</sup>

Indiana courts have held, at various times, that foreseeability

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App. 204, 34 N.E.2d 157 (1941).

<sup>168</sup>PROSSER, *supra* note 107, § 44, at 286.

<sup>169</sup>See *id.* at 289 n.55.

<sup>170</sup>346 N.E.2d 655 (Ind. Ct. App. 1976).

<sup>171</sup>*Id.* at 658.

<sup>172</sup>*Id.* at 660.

<sup>173</sup>PROSSER, *supra* note 107, § 44, at 273, 275.

is an element of duty rather than proximate cause.<sup>174</sup> In *Geyer v. City of Logansport*,<sup>175</sup> the defendant police officer fired two bullets at a bull roaming at large in a residential area. One of the bullets ricocheted off the bull and struck the plaintiff, who was standing at a ninety degree angle to the defendant's line of fire. Both the plaintiff and defendant testified at trial that they did not anticipate that the bullet would ricochet as it did. Reasoning that what is reasonably foreseeable must be measured by objective rather than subjective standards, the court placed little credence in this testimony and rejected the defendant's contention that the shooting was an unforeseeable freak accident. In a *Palsgraf*-like analysis,<sup>176</sup> the court held that the harm suffered by plaintiff was sufficiently foreseeable to warrant the submission of negligence to the jury. Although it may appear, at first blush, that the court attenuated the concept of foreseeability, *Geyer* is in accord with the general rule that "as the gravity of harm increases, the apparent likelihood of its occurrence need be correspondingly less."<sup>177</sup>

#### D. Vicarious Liability

Dean Prosser has described the principle of vicarious liability as a means by which the law accomplishes a deliberate allocation of risk.<sup>178</sup> The automobile has been responsible for numerous extensions of the principle of vicarious liability because "it is felt that, since automobiles are expensive, the owner is more likely to be able to pay any damages than the driver . . . and that the owner is the obvious person to carry the necessary insurance to cover the risk."<sup>179</sup> Apart from the vicarious liability of a master for the negligence of his servants, the three most common devices for allocating losses arising out of automobile collisions are consent statutes, the family purpose doctrine, and the joint enterprise doctrine.

Consent statutes generally provide that the owner of an automobile is liable for damages caused by any person driving the automobile with the owner's consent.<sup>180</sup> A modified consent statute is found in Indiana Code section 9-1-4-32,<sup>181</sup> which provides, in substance, that a person who signs a minor's driver's license appli-

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<sup>174</sup>*E.g.*, *Southern Ry. v. Harpe*, 223 Ind. 124, 58 N.E.2d 346 (1944); *Galbreath v. Engineering Constr. Corp.*, 149 Ind. App. 347, 273 N.E.2d 121 (1971).

<sup>175</sup>346 N.E.2d 634 (Ind. Ct. App. 1976).

<sup>176</sup>*Palsgraf v. Long Island Ry.*, 248 N.Y. 339, 162 N.E. 99 (1928).

<sup>177</sup>Prosser, *supra* note 107, § 31, at 147.

<sup>178</sup>*Id.* § 69, at 459.

<sup>179</sup>*Id.* § 73, at 481.

<sup>180</sup>*Id.* at 486-87.

<sup>181</sup>IND. CODE § 9-1-4-32(c) (Burns Supp. 1976).



cation is jointly and severally liable with the minor for damages caused by the minor's negligent operation of a motor vehicle. In *Wenisch v. Hoffmeister*,<sup>182</sup> the Second District Court of Appeals held that this statute imputes liability only, and does not serve to impute the contributory negligence of a minor to the person who sponsored his driver's license application. The defendant in *Wenisch* unsuccessfully contended that the contributory negligence of a minor should have been imputed to his father, who signed the driver's license application, to preclude the father from recovering for damage caused to his automobile by the defendant. The court's holding is supported by policy and reason. The statute was enacted to protect the public from impecunious minors.<sup>183</sup> It was not intended to diminish the recovery of a person who fulfilled this statutory purpose by agreeing to become vicariously liable for damages arising from a minor's negligence.

Indiana does not follow the family purpose doctrine, which is recognized by approximately one-half of the states.<sup>184</sup> The family purpose doctrine provides that an owner of an automobile who permits a member of his family to drive his automobile for a family purpose makes the family purpose a business purpose, and the member of his family is considered to be his agent.<sup>185</sup> Like most states, however, Indiana follows the joint enterprise doctrine.<sup>186</sup> Although this doctrine was precipitated by the search for financially responsible defendants in automobile cases, it ironically has evolved into a "defendant's doctrine" because it has been used most frequently to impute the contributory negligence of another to the plaintiff.<sup>187</sup> Thus, it is not uncommon for a passenger in an automobile to be barred from recovering from negligent third persons because the driver of the vehicle in which he was riding was guilty of contributory negligence. A joint enterprise is analogous to a partnership, and the courts generally have required that the undertaking be motivated by a common pecuniary purpose before a joint enterprise will be found to exist.<sup>188</sup> In the recent case of *Grinter v. Haag*<sup>189</sup> the First District Court of Appeals underscored the importance of a common pecuniary purpose, and indicated that efforts to make the family purpose doctrine a part of

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<sup>182</sup>342 N.E.2d 665 (Ind. Ct. App. 1976).

<sup>183</sup>*Id.* at 667. Cf. PROSSER, *supra* note 107, § 73, at 486-87.

<sup>184</sup>*E.g.*, Bryan v. Pommert, 110 Ind. App. 61, 37 N.E.2d 720 (1941); PROSSER, *supra* note 107, § 73 at 483.

<sup>185</sup>PROSSER, *supra* note 107, § 73, at 483-86.

<sup>186</sup>*E.g.*, Keck v. Pozorski, 135 Ind. App. 192, 191 N.E.2d 325 (1963); PROSSER, *supra* note 107, § 72.

<sup>187</sup>PROSSER, *supra* note 107, § 72, at 476.

<sup>188</sup>*Id.* at 479.

<sup>189</sup>344 N.E.2d 320 (Ind. Ct. App. 1976).

Indiana law under the guise of the joint enterprise doctrine will meet with no success.

The plaintiff in *Grinter* was the owner of and passenger in an automobile being driven by his spouse at the time of a collision with the defendant's vehicle. The trial court instructed the jury on the joint enterprise doctrine on the ground that the trip was undertaken for the pecuniary purpose of moving to plaintiff's new place of employment, and the jury returned a verdict in favor of the defendant. The defendant contended on appeal that the purpose of the trip was to enhance family income, and that plaintiff's spouse had a common pecuniary interest in the accomplishment of that purpose because she was unemployed and dependent upon the plaintiff for her support. Thus, according to the defendant, it was proper for the jury to charge the plaintiff with the contributory negligence of his spouse. Rejecting this argument, the court held that the application of the joint enterprise doctrine to the marital relationship is limited to situations in which each spouse directly and actively participates in a business venture. The purpose for which the plaintiff's spouse made the trip, the court reasoned, was the furtherance of the marital relationship, and any pecuniary interest that she had in the trip was merely incidental.<sup>190</sup>

### E. Damages

In *Nicholson's Mobile Home Sales, Inc. v. Schramm*,<sup>191</sup> the First District Court of Appeals clarified Indiana's position on the propriety of awarding punitive damages where the defendant may be subject to criminal prosecution for the same act. In *Schramm*, the circumstances of defendant's unlawful self-help repossession techniques,<sup>192</sup> which included a trespass and assault and battery, were found to be sufficiently aggravating to permit an award of punitive damages. Defendants on appeal alleged error in the trial court's refusal to instruct the jury that punitive damages cannot be recovered where the defendant may be subject to criminal prosecution for the same act. The court, citing *Taber v. Hutson*,<sup>193</sup> conceded that defendant had correctly stated the general rule in Indiana. However, the court went on to list three exceptions to the general rule of *Taber*. First, a defendant who may be subject to

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<sup>190</sup>*Id.* at 324.

<sup>191</sup>330 N.E.2d 785 (Ind. Ct. App. 1975), also discussed in Townsend, *Secured Transactions and Creditors' Rights*, *supra*.

<sup>192</sup>The repossession was unlawful because the plaintiffs' lien on the seized property turned out to be superior to that of the defendant's. The trespass and assault and battery were held to constitute a "breach of the peace" under IND. CODE § 26-1-9-503 (Burns 1974).

<sup>193</sup>5 Ind. 322 (1854).

criminal prosecution may still be liable for punitive damages for conduct which indicates a "heedless disregard of the consequences."<sup>194</sup> Second, "if the statute of limitations has run on the criminal charges, punitive damages may not necessarily be precluded."<sup>195</sup> Finally, a corporation, since it cannot be criminally prosecuted, may be liable for punitive damages for the acts of its agents.<sup>196</sup> Concluding that all three of these exceptions were applicable to the facts of this case, the court held that the trial court had not erred in refusing the defendant's requested instruction.<sup>197</sup>

*Childs v. Rayburn*<sup>198</sup> also presented the court of appeals with the issue of the proper jury instruction to be used for calculating damages in a parent's action for wrongful death of his minor child. The trial court had correctly instructed the jury that recovery in such an action is limited to the actual pecuniary loss resulting from the death of the child, but also instructed that in making the calculation, elements of damage such as loss of care, loss of love and affection, and loss of parental training and guidance could be considered.<sup>199</sup> Despite the apparent inconsistency the court

<sup>194</sup>330 N.E.2d at 791, *citing* True Temper Corp. v. Moore, 299 N.E.2d 844 (Ind. Ct. App. 1973); Capitol Dodge, Inc. v. Haley, 154 Ind. App. 1, 288 N.E.2d 766 (1972); Moore v. Crose, 43 Ind. 30 (1873).

<sup>195</sup>330 N.E.2d at 791, *citing* True Temper Corp. v. Moore, 299 N.E.2d 844 (Ind. Ct. App. 1973); Cohen v. Peoples, 140 Ind. App. 353, 220 N.E.2d 665 (1966) (dictum).

<sup>196</sup>330 N.E.2d at 791, *citing* Indianapolis Bleaching Co. v. McMillan, 64 Ind. App. 268, 113 N.E. 1019 (1916); Baltimore and O.S.W. R.R. v. Davis, 144 Ind. App. 375, 89 N.E. 403 (1909).

<sup>197</sup>The court also held that the trial court had properly rejected defendant's contention that punitive damages are not normally awarded in cases involving real property, such as trespass actions. 330 N.E.2d at 791.

<sup>198</sup>346 N.E.2d 655 (Ind. Ct. App. 1976), also discussed at text accompanying notes 170-73 *supra*.

<sup>199</sup>The general rule is that the parent may recover:

the value of the child's services from the time of death until he would have attained his majority taken in connection with his prospects in life less the cost of his support and maintenance during that period, including board, clothing, schooling and medical attention. To this may be added, in proper cases, the expenses of care and attention to the child, made necessary by the injury, funeral expenses and medical services. Appellants also add that the jury may consider the condition of the decedent's family and the pecuniary value of all acts of kindness and attention which the deceased child might reasonably be anticipated to render until its majority. But that the parent has been deprived of the happiness, comfort, and society of the child or has incurred physical or mental suffering or pain by reason of loss of the child, may not be considered by the jury.

*Id.* at 633-63, quoting from Hahn v. Moore, 127 Ind. App. 149, 133 N.E.2d 900 (1956) (citations omitted).

affirmed a verdict for the plaintiff, concluding that the instructions were not contradictory and, taken as a whole, were not prejudicially misleading.<sup>200</sup> The decision seems somewhat suspect however, since in considering loss of love and affection the jury may have awarded damages for the sorrow and mental distress of the parents rather than the actual pecuniary loss resulting from the death of the child.

## **XIX. Trusts and Decedents' Estates**

*Melvin C. Poland\**

Although the development of case law in this area produced no "landmark" decisions during the current survey period, two cases involving claims against a decedent's estate and one involving the constitutionality of a family protection statute warrant review. This survey also contains a brief comment on new sections of the Indiana Code, which are primarily concerned with non-probate transfers. Creation of multi-party accounts under the new statutes is of particular significance in administration of estates.

### *A. Case Development*

#### *1. Claims Against Decedents' Estates*

In *Richardson v. Richardson*,<sup>1</sup> the court of appeals held that funeral expenses are "unquestionably" a claim against a decedent's estate but are not to be considered part of the expenses of administration. The effect of this holding is to make claims for

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Indiana adheres to the position (probably a minority one) that the value of lost services and contributions from the child after he has reached majority may not be recovered. This limitation has been criticized since the parents have already incurred a large cost in raising a child who is approaching majority and yet the child will often not become a financial asset to his parents until he is near to or has reached majority. See C. McCORMICK, *LAW OF DAMAGES* § 101 (1935).

<sup>200</sup>The court was willing to concede, however, that an instruction which more closely follows the language of *Hahn* is preferable.

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The author thanks Stephen J. Spoltman for his assistance in the preparation of this discussion.

<sup>1</sup>345 N.E.2d 251 (Ind. Ct. App. 1976). For another discussion of this case, see Townsend, *Secured Transactions and Creditors' Rights*, *supra* at 333.

funeral expenses subject to the two limitation periods set forth in Indiana Code section 29-1-14-1.<sup>2</sup> The decedent, a Florida resident, died intestate in October 1969 and administration of his estate was commenced in that state within a matter of days. The decedent's widow was named administratrix in the Florida probate proceeding. In April 1973, upon petition by the widow, ancillary administration was opened in Madison County, Indiana. On May 14, 1973, appellee, the decedent's son, filed a claim against the estate for funeral expenses he had paid.<sup>3</sup> The court allowed the claim and this appeal followed.

Appellee argued that funeral expenses are a part of the expenses of administration, and therefore are specifically excepted from the limitation periods of the statute. This argument was based on certain language in a case decided in 1909, *Hildebrand v. Kinney*,<sup>4</sup> to the effect that funeral expenses "stand in the same category as the expenses of administration."<sup>5</sup> The court noted that the *Hildebrand* holding was based on two statutes which are substantially different from the present non-claim statute. One of the statutes on which *Hildebrand* was grounded refers to debts and obligations arising before the death of the decedent.<sup>6</sup> Since funeral expenses are not debts of the decedent they are not "accounts against him or his estate" within the meaning of that statute. The second ground of the *Hildebrand* decision, a non-claim statute, was

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<sup>2</sup>The statute specifically excludes expenses of administration but not funeral expenses from the two limitation periods. It provides in pertinent part:

(a) All claims against a decedent's estate, other than expenses of administration and claims of the United States, and of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent, unless filed with the court in which such estate is being administered within five [5] months after the date of the first published notice to creditors.

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(d) All claims barrable under the provisions of subsection (a) hereof shall, in any event, be barred if administration of the estate is not commenced within one [1] year after the death of the decedent.

IND. CODE § 29-1-14-1 (Burns Supp. 1976).

<sup>3</sup>The court noted that "a similar claim had been filed against the Florida estate and was still pending," but that it appeared there would be insufficient assets in the Florida estate to satisfy the claim if it were allowed. 345 N.E.2d at 251 n.1.

<sup>4</sup>172 Ind. 447, 87 N.E. 832 (1909).

<sup>5</sup>*Id.* at 451, 87 N.E. at 834, quoted in 345 N.E.2d at 252-53.

<sup>6</sup>Ch. 38, § 37, 1881 Ind. Acts Spec. Sess. 240 [now IND. CODE § 34-1-2-1 (Burns 1973), a general statute of limitations on accounts and contracts, rather than a non-claim statute].

also restricted to "claims against the decedent." In contrast, the present non-claim statute is all-inclusive, referring to claims "against decedent's estate."<sup>8</sup> Since it was a claim against the estate, and since it was not filed within one year of the death of the decedent, the claim for funeral expenses was barred by Indiana Code section 29-1-14-1.

While the judgment may be correct based on a proper construction of present statutes, one may question whether the result is a desirable one. Limitation statutes designed to promote expeditious administration should not foreclose recovery on a claim unless absolutely essential to that purpose. This is particularly pertinent in respect to estate expenses such as taxes, expenses of administration, funeral expenses, and family allowances.<sup>9</sup>

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<sup>8</sup>The governing statute at the time was ch. 45, § 86, 1881 Ind. Acts Spec. Sess. 443, *quoted in pertinent part in* 345 N.E.2d at 253.

<sup>9</sup>See note 2 *supra*. If the court were limited to the language of IND. CODE § 29-1-14-1 (Burns Supp. 1976) it could be argued that no language contained therein requires a court to hold that funeral expenses are not includable within the meaning of administration expenses. However, section 29-1-14-1 is not the only statute to be considered. The definition section separately lists expenses and assigns each a different priority in case of insufficient funds.

"'Claims' include liabilities of the decedent which survive, whether arising in contract or otherwise, *funeral expenses*, the expense of a tombstone, *expenses of administration* and all estate and inheritance taxes." IND. CODE § 29-1-1-3 (Burns Supp. 1976) (emphasis added). The "classification of claims and allowances" statute also separately lists administration expenses and funeral expenses and assigns each a different priority in case of insufficient funds. *Id.* § 29-1-14-9 (Burns 1972), which reads in pertinent part:

All claims and allowances shall be classified in one [1] of the following classes. If the applicable assets of the estate are insufficient to pay all claims and allowances in full, the personal representative shall make payment in the following order:

1. Costs and expenses of administration.
2. Reasonable funeral expenses: Provided, That in any estate in which the decedent was a recipient of public assistance under "The Welfare Act of 1936", the amount of funeral expenses having priority over any claim for the recovery of public assistance shall not exceed the limitations provided for under . . . "The Welfare Act of 1936," as amended or as superseded by replacement.
3. Allowance made to the surviving spouse or dependent children of the decedent.

In a case involving public assistance, the court in *Abbott v. Department of Public Welfare*, 243 Ind. 596, 602, 189 N.E.2d 417, 420 (1963), stated, "Reasonable funeral expenses are of greater priority than any other items except costs of administration," thus recognizing funeral expenses and costs of administration as separate and distinct claims.

It may be noted that "family allowances" are not listed as a claim within the definition statute. IND. CODE § 29-1-1-3 (Burns Supp. 1976).

Prior to the 1976 amendment the statute drew a distinction between "claims" and "allowances" and listed allowances made to widow and children as a third priority. However, as amended in 1976 the statute now provides in

In *White v. White*<sup>10</sup> the principal issue on appeal was whether the unpaid balance on a prior alimony judgment was a valid claim against the estate of the decedent. In 1971 the decedent had obtained a divorce from appellee. In addition to an award of certain real and personal property, the court decreed that plaintiff (decedent) should pay to the defendant as "alimony in lieu of property settlement the sum of One Hundred Thousand Dollars (\$100,000.00), as follows: Thirty-four Thousand Dollars (\$34,000.00) cash, and the sum of Sixty-six Thousand Dollars (\$66,000.00), payable at the rate of Six Thousand Dollars (\$6,000.00), beginning January 15, 1972, and the sum of Six Thousand Dollars (\$6,000.00) each January thereafter, to and including January 15, 1982."<sup>11</sup> On the death of her former husband the appellee filed a claim against his estate for the unpaid balance of that judgment.<sup>12</sup> The claim was disallowed by the appellant, decedent's personal representative, and the matter was brought before the Vanderburgh Superior Court. After a finding that the \$48,000 had not been paid, the trial court held that appellee was entitled to judgment in the amount of \$37,283.34 together with interest from date of judgment, and directed the personal representative to pay the award. Appellant presented two arguments to support her contention that the claim should not have been allowed. She first argued that the trial court in the divorce proceedings had exceeded its statutory authority in the award of alimony, contending that the award was in fact one of "periodic" payments not permitted by statute.<sup>13</sup> The court concluded that the alimony award in this instance was a "gross" alimony award payable in

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pertinent part: "All claims shall be classified in one [1] of the following classes . . . (3) Allowance made to the surviving spouse or dependent children of the decedent." IND. CODE § 29-1-14-9 (Burns Supp. 1976). Thus it is now arguable that family allowances are claims within the limitation statute, *id.* § 29-1-14-1, and unless a claim is filed within the limitation periods stated therein, the survivor's allowance under *id.* § 29-1-4-1 would be barred. Perhaps an exception should be made for all estate claims—funeral expenses, family allowances and expenses of administration—in regard to this section of the statute, providing for a loss of priority in the case of funeral expenses and family allowances if they are not filed within five months after the first notice to creditors and for a complete bar if no administration is opened within one year.

<sup>10</sup>338 N.E.2d 749 (Ind. Ct. App. 1975).

<sup>11</sup>*Id.* at 751.

<sup>12</sup>Appellee's claim alleged that of the \$66,000 in delayed payments, \$18,000 had been paid and \$48,000 remained wholly due and owing. *Id.*

<sup>13</sup>This contention raises questions concerning proper construction of Indiana alimony statutes, including whether Indiana Code provisions preceding present law permitted a periodic payment alimony award, installment payment of a gross award, etc. These issues are discussed in Proffitt, *Domestic Relations*, *supra* at 224, and will not be covered here.



installments, and that existing statutes, properly construed, permitted such an award.<sup>14</sup> The second argument against allowance of the claim, assuming the alimony decree was proper, was based on the fact that the court had not made the future payments a lien upon the estate of the decedent, or otherwise required security, since payments were not due and payable at the time of the judgment debtor's death. Thus the judgment could not be a valid claim against his estate. In response to this contention, the court noted that while the divorce court could have made the future payments a lien on the real estate and chattels of the husband,<sup>15</sup> failure to so decree did not mean that the obligation created by that judgment was destroyed. The court held the only effect to be that the claimant was required to press her claim "as a general creditor of the estate rather than as a secured creditor."<sup>16</sup>

## 2. *Constitutionality of Family Protection Statute*

From the beginning Indiana probate legislation designed to provide a measure of protection for the family unit, including

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<sup>14</sup>In effect, the court found that the governing alimony award statutes permitted awards of gross alimony payable in installments as well as "periodic" payment awards. 338 N.E.2d at 753-56. The language of the court leaves unanswered the question of whether an award of "periodic payments" would give rise to a claim against the estate of a party against whom such an award was decreed.

<sup>15</sup>The statute expressly provided that the judgment would be "a lien upon the real estate and chattels real of the spouse liable therefor to the extent that it is payable immediately *but shall not be such a lien to the extent that it is payable in the future unless and to the extent such decree so provides expressly.*" Ch. 120, § 3, 1949 Ind. Acts 310 (repealed 1973) (emphasis added).

<sup>16</sup>338 N.E.2d at 756. Another case involving a claim against a decedent's estate is *State ex rel. Murray v. Heithecker*, 333 N.E.2d 308 (Ind. Ct. App. 1975). One of the issues on appeal was whether the personal representative became a party to a trial court proceeding which concerned allowance of a claim against the estate. Plaintiff-appellant filed a claim against the estate in the circuit court, which was allowed on the same day. Thereafter, defendant-appellee, the personal representative, filed an answer to the claim with a request for trial by jury. The trial resulted in a judgment in favor of the estate and an appeal followed. After reviewing three code provisions, IND. CODE §§ 29-1-14-10, 29-1-14-12, 29-1-14-13 (Burns Supp. 1976), all of which clearly set forth the active role of the personal representative in approval, disallowance, and trials with respect to such claims, the court concluded that the personal representative becomes a party by operation of law upon the filing of a claim against the estate. This conclusion is supported by prior Indiana case law. *Hull v. Burress*, 120 Ind. App. 507, 93 N.E.2d 213, (1950); *Bowman v. Citizens Nat'l Bank*, 25 Ind. App. 38, 56 N.E. 39 (1900). In the *Hull* case, the court stated: "After the filing of the claim against the estate as required by law, the executrix became a party by operation of law, and the appellee's failing to name the executrix in her statement of claim did not invalidate the same." *Id.* at 513, 93 N.E.2d at 216.

statutes concerning the homestead, widow's allowance, and family allowance,<sup>17</sup> limited that protection to the "widow" or "widow and minor children." In 1953 the homestead right was extended to a surviving husband,<sup>18</sup> but different treatment accorded spouses based on sex was continued in the widow and family allowance provisions until the Probate Reform Act of 1975, which became effective January 1, 1976.<sup>19</sup> Although no vested rights would have been affected, the changes which granted rights to the widower as well as the widow were not made retroactive. Consequently, the estates of persons who died before January 1, 1976, are governed by the law existing at the date of the decedent's death. The result: a challenge to the constitutionality of former Indiana Code section 29-1-4-2, which provided for a "widow's" allowance, and to that portion of former Indiana Code section 29-1-4-3 which limited the family allowance to "widows."

In *In re Estate of Parson*<sup>20</sup> the surviving widower petitioned to recover the statutory widow's allowance and family allowance.<sup>21</sup> The trial court<sup>22</sup> denied the petition and the widower appealed, contending that the different treatment accorded persons similarly situated based on the sex of the parties violated the equal protection clause of the fourteenth amendment.<sup>23</sup> In affirming the trial court, the court of appeals relied primarily on the language of *Indiana High School Athletic Association v. Raike*<sup>24</sup> and *Kahn v. Shevin*.<sup>25</sup> The *Raike* court noted that classification based upon sex "has not yet been determined to be a 'suspect classification' by a majority of the United States Supreme Court," and held that

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<sup>17</sup>Ch. 27, § 28, 1852 Ind. Acts 248 (homestead); Pub. L. No. 403, § 1, 1971 Ind. Acts 1892 (widow's allowance); *id.* § 2 (family allowance) (all repealed 1975).

<sup>18</sup>Ch. 112, § 401, 1953 Ind. Acts 295. The amendment changed the prior statute in several particulars, one of which was to give a right to use of the dwelling to both spouses. The homestead allowance was abolished by the Probate Reform Act of 1975. See Pub. L. No. 288, 1975 Ind. Acts 1583; IND. CODE § 29-1-4-1 (Burns Supp. 1976); Poland, *Trusts and Decedents' Estates, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 371, 381 (1975).

<sup>19</sup>See IND. CODE §§ 29-1-4-1 to -3 (Burns Supp. 1976); Poland, *supra* note 18, at 381-82. The new allowance is made available to the "surviving spouse."

<sup>20</sup>344 N.E.2d 317 (Ind. Ct. App. 1976).

<sup>21</sup>Under the law existing at decedent's death, a widow would have been entitled to a widow's allowance in the amount of \$3,000 and a family allowance not to exceed \$50 per week for not more than one year. See statutes cited note 17 *supra*.

<sup>22</sup>Suit was brought in the Posey County Circuit Court.

<sup>23</sup>344 N.E.2d at 319. Parson argued that the classification bears no relation to the purpose of the statutes.

<sup>24</sup>329 N.E.2d 66 (Ind. Ct. App. 1975).

<sup>25</sup>416 U.S. 351 (1974).

when legislation is challenged on the basis of the equal protection clause and the classification is not suspect the standard of review to be applied is whether the classification is "reasonable" and bears a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."<sup>26</sup>

In *Kahn v. Shevin*,<sup>27</sup> the United States Supreme Court considered essentially the same constitutional issue as considered by the *Parson* court: the constitutionality of a Florida statute which provided certain benefits to widows and not to widowers. Applying the "fair and substantial relation" test, the Court held the classification valid, since the object of the statute was reduction of "disparity between the economic capabilities of a man and a woman."<sup>28</sup> The Indiana Court of Appeals found the reasoning of *Kahn* persuasive and upheld the constitutional validity of the challenged statutes.

In further support of its decision, the court observed that to hold otherwise would result in "complete abrogation" of the widow's and family allowance, "a result not expressly desired by either party."<sup>29</sup> The court's logic is not inescapable. It would seem that extension of coverage of the former statutes to widowers as well as widows would be an alternative to holding that the discriminatory underinclusion is ground for declaring the statutes constitutionally invalid. Precedent for this construction can be found in *Moritz v. Commissioner of Internal Revenue*,<sup>30</sup> an action challenging the validity of a tax deduction statute which accorded different treatment based on sex classification. In *Moritz*, the court found the classification to be "invidious discrimination" and therefore

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<sup>26</sup>329 N.E.2d at 76, quoting from *Reed v. Reed*, 404 U.S. 71, 76 (1971) (emphasis in original). For a further discussion of the standards of judicial review applicable when classifications are challenged as being in violation of the equal protection clause, see Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. L. REV. 280, 283 (1971); Stroud, *Sex Discrimination in High School Athletics*, 6 IND. L. REV. 661, 670 (1973); Torke, *Constitutional Law, 1974 Survey of Recent Developments in Indiana Law*, 8 IND. L. REV. 94, 104 (1974).

<sup>27</sup>416 U.S. 351 (1974).

<sup>28</sup>344 N.E.2d at 320. The court of appeals quoted at length from the *Kahn* opinion regarding the disparity of economic opportunity available to men and women, justifying the conclusion that a classification based on sex bears a fair and substantial relation to the purpose which the statute seeks to accomplish. This justification is also discussed in Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VAL. L. REV. 237 (1971).

<sup>29</sup>344 N.E.2d at 320.

<sup>30</sup>469 F.2d 466 (10th Cir. 1972).

invalid.<sup>31</sup> However, the court went on to find, "Where a court is compelled to hold such a statutory discrimination invalid, it may consider whether to treat the provisions containing the discriminatory underinclusion as generally invalid, or whether to extend the coverage of the statute . . . ."<sup>32</sup> The court held that the benefit of the deduction should be extended to the taxpayer, stating, "Here, extending the coverage of the deduction provisions seems logical and proper, in view of their purpose and the broad separability clause in the act."<sup>33</sup> Extension of the former widow's and family allowances to widowers in those cases governed by pre-1976 law seems a logical and proper alternative to disposition of the matter in *Parson v. Grabert*.<sup>34</sup>

### B. Legislative Developments

In the common practice in which the owner of money establishes a multi-party account, naming himself and some other person or persons as joint owners, questions arise concerning the intention of the creator. He may have intended to make a present gift of an interest in the account, thus raising a question of whether the prerequisites for a gift of present interest have been met. If he intended only an interest at death, the validity of such an account may be questioned on the ground of its testamentary nature. Perhaps he only intended to create a convenience account with no real interest in the non-owning parties. As a result of this confusion, these accounts have been a prolific source of litigation,<sup>35</sup>

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<sup>31</sup>*Id.* at 470.

<sup>32</sup>*Id.*

<sup>33</sup>*Id.* The separability clause referred to in the opinion is 26 U.S.C. § 7852(a) (1970), which provides: "If any provision of this title, or the application thereof to any person or circumstances, is held invalid, the remainder of the title, and the application of such provision to other persons or circumstances, shall not be affected thereby."

<sup>34</sup>Admittedly, the separability provision of the Indiana Probate Code does not lend itself to extending coverage as well as the U.S.C. provision. The Probate Code provides in pertinent part:

If any provision of this [Probate] Code or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the [Probate] Code which can be given effect without the invalid provision or application, and to this end the provisions of this act are declared to be severable.

IND. CODE § 29-1-1-2 (Burns 1972).

<sup>35</sup>Not only have the multi-party accounts been a source of much litigation, but they have also produced an abundance of literature on the subject. Two articles which point up some of the special problems such accounts create are: Kepner, *Five More Years of the Joint Bank Account Muddle*, 26 U. CHI. L. REV. 376 (1959); Wellman, *The Joint and Survivor Account in Michigan—Progress Through Confusion*, 63 MICH. L. REV. 629 (1965).

including several recent Indiana cases.<sup>36</sup> Though by no means speaking to all the questions raised concerning these accounts, adoption by the 1976 General Assembly<sup>37</sup> of Article VI, the non-probate transfers provisions of the Uniform Probate Code (U.P.C.),<sup>38</sup> should significantly reduce litigation in this area.

It is important to recognize that Article VI of the U.P.C., which is now Indiana statutory law,<sup>39</sup> concerns non-probate trans-

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<sup>36</sup>The most recent Indiana case in this area is *Robison v. Fickle*, 340 N.E.2d 824 (Ind. Ct. App. 1976) in which the decedent had issued certificates of deposit and common stock in her name and the names of her niece and nephew as joint tenants with right of survivorship and not as tenants in common. The decedent had also created a joint savings account in her own name and that of her niece and had signature cards prepared which indicated that a gift and delivery were intended. The executor of the decedent's estate filed a declaratory judgment action seeking to resolve conflicting ownership claims between the residuary legatees and the niece and nephew. The trial court entered judgment in favor of the niece and nephew, upholding their claim as surviving joint tenants.

The appellate court affirmed. It is not clear whether the decision is based on a theory of third party beneficiary or on the creation of a joint tenancy. Joint savings accounts do not lend themselves to a joint tenancy construction in the absence of an equal right in the parties to withdraw during the lifetime of the creator, but may be sustained on the basis of third party beneficiary construction, while the stocks may be sustained as joint tenancy.

The court emphasized decedent's use of words of joint tenancy with right of survivorship and the absence of evidence indicating a different intent or that decedent had been defrauded or coerced. Neither the fact that the decedent had retained control of the property and received the benefits during her lifetime nor absence of the common law requirement of unity of time were considered sufficient to defeat recognition of the valid creation of a joint tenancy.

In *Seavey v. Fanning*, 333 N.E.2d 80 (Ind. 1975), the decedent purchased certificates of deposit made payable to either the decedent or his daughter with right of survivorship and not as tenants in common. After the decedent's death the certificates of deposit were delivered to the daughter, who had been unaware of the transaction, and the administrators of decedent's estate brought suit to recover them. The Indiana Supreme Court held that the certificates of deposit were third party beneficiary contracts and the daughter was deemed a donee beneficiary.

A different result had been reached by the court of appeals in *Zehr v. Daykin*, 153 Ind. App. 537, 288 N.E.2d 174 (1972), a case in which decedent purchased certificates of deposit and orally requested the bank to prepare them in his own name and that of another party as joint tenants. No signature card, deposit agreement or other writing was ever signed by decedent or delivered to the other person. The court found that since there had been no delivery of the certificates they were not the subject of a valid inter vivos gift.

<sup>37</sup>IND. CODE §§ 32-4-1.5-1 to -15 (Burns Supp. 1976) (effective Jan. 1, 1977).

<sup>38</sup>UNIFORM PROBATE CODE §§ 6-101 to -113, 6-201 [hereinafter cited as U.P.C.].

<sup>39</sup>This is not the first attempt in Indiana to deal statutorily with survivor-

fers and has major significance apart from the effect of multi-party accounts on decedents' estates and the administration thereof.<sup>40</sup> The first thirteen sections deal with multi-party accounts in financial institutions.<sup>41</sup> Of these, six sections concern protection for the financial institution on payment out of such an account and the right to setoff.<sup>42</sup> These sections are beyond the scope of this survey, which deals only with those sections affecting decedents' estates and trusts.

To understand the new multi-party accounts provisions, it is essential to have a grasp of the terminology used therein. "Financial institutions" include, but are not limited to, "banks and trust companies, building and loan associations, industrial loan and investment companies, savings banks, and credit unions."<sup>43</sup> A "multiple-party account" is one which has two or more names on the account and includes the joint account, P.O.D. account, and trust account.<sup>44</sup> A "joint account" is one which is payable on request to one or more of two or more parties whether or not mention is

ship rights in jointly held property. Prior to 1971, the Indiana Code provided that in the case of persons holding personal property as joint tenants, except as to obligations of the United States government, the survivor should have only the rights of a survivor of tenants in common, "unless otherwise expressed in the instrument." In 1971, amendments were enacted, in IND. CODE § 32-4-1-1, to provide that household goods acquired during coverture and in the possession of both husband and wife, promissory notes, bonds, certificates of deposit or other written or printed instruments evidencing an interest in tangible or intangible personal property in the name of both husband and wife, including certificates of title to automobiles, should upon the death of either become the sole property of the surviving spouse, unless a clear contrary intention was expressed in the written instrument.

In 1975, as part of the Probate Reform Act, the Probate Code Study Commission recommended adoption of Article VI of the U.P.C. in lieu of the aforementioned statute. The General Assembly failed to adopt Article VI, but proceeded to repeal IND. CODE § 32-4-1-1, presumably resulting in a return to the common law, which preferred joint tenancy with right of survivorship in the absence of a contrary intention expressed in the instrument.

<sup>40</sup>IND. CODE §§ 32-4-1.5-1 to -15 (Burns Supp. 1976) (effective Jan. 1, 1977).

<sup>41</sup>*Id.* §§ 32-4-1.5-1 to -13.

<sup>42</sup>*Id.* §§ 32-4-1.5-8 to -13. For a comment on these bank protection provisions see UNIFORM PROBATE CODE PRACTICE MANUAL §§ 15.8-15.11 (R. Wright ed. 1972) [hereinafter cited as U.P.C. PRACTICE MANUAL].

<sup>43</sup>IND. CODE § 32-4-1.5-1(3) (Burns Supp. 1976) (effective Jan. 1, 1977).

<sup>44</sup>A multiple party account does not include:

[A]ccounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one [1] or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

*Id.* § 32-4-1.5-1(5).

made of a right of survivorship.<sup>45</sup> The "P.O.D. account" is one which is payable to a named beneficiary on death,<sup>46</sup> and the "trust account" covered by the statute is the one usually referred to as the Totten or tentative trust.<sup>47</sup>

As between the parties<sup>48</sup> named on the account, the code spells out the ownership of the beneficial interest during the lifetime and at the death of any party to the account. Lifetime interests in the account, though of major significance, do not bear directly on decedents' estates and administration thereof, in view of subsequent code provisions relative to survivorship rights. For our purposes, it is sufficient to note that the code provides, in the absence of clear and convincing evidence to the contrary, that the account belongs during his lifetime to the person who provided the money establishing the account, whether it is a joint account, a P.O.D. account, or a trust account.<sup>49</sup> Generally, however, most "joint" ac-

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<sup>45</sup>*Id.* § 32-4-1.5-1(4).

<sup>46</sup>*Id.* § 32-4-1.5-1(10).

<sup>47</sup>"Trust account" means an account in the name of one [1] or more parties as trustee for one [1] or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

*Id.* § 32-4-1.5-1(14).

<sup>48</sup>The code defines "party" as

[A] person who, by the terms of the account has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal.

*Id.* § 32-4-1.5-1(7).

<sup>49</sup>(a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two [2] or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing



counts are made payable on the signature of any one of the parties; thus although the interest of the party is limited to the extent of contribution,<sup>50</sup> the financial institution is protected if it pays out to a party without any present interest.<sup>51</sup>

It is the non-contributor's lack of present beneficial interest in the account which suggests the testamentary character of providing a survivorship interest in such a party. Under the new code sections this issue appears to be settled, since the statutes specifically provide that in the case of a joint account the balance belongs to the surviving party or parties "as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created."<sup>52</sup> The survivorship right is also expressly provided for on the death of the original payee or payees in the case of the P.O.D. account,<sup>53</sup> and on the death of the trustee or survivor of two or more trustees in

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evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two [2] or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

*Id.* § 32-4-1.5-3.

<sup>50</sup>*Id.*; U.P.C. PRACTICE MANUAL, *supra* note 42, § 15.6.

<sup>51</sup>IND. CODE § 32-4-1.5-8 (Burns Supp. 1976) (effective Jan. 1, 1977). It is arguable that if a non-contributing party has been given a right of withdrawal, particularly when there has been delivery of the passbook to facilitate such a withdrawal, this is clear and convincing evidence of an intent to make a gift of a present interest within the meaning of *id.* § 32-4-1.5-3(a).

<sup>52</sup>Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two [2] or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 3 [32-4-1.5-3] augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

*Id.* § 32-4-1.5-4(a).

<sup>53</sup>If the account is a P.O.D. account, on death of the original payee or of the survivor of two [2] or more original payees, any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or the survivor of them if one [1] or more die before the original payee: if two [2] or more P.O.D. payees survive, there is no right of survivorship in event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

*Id.* § 32-4-1.5-4(b).

the case of a trust account.<sup>54</sup> Furthermore, the code not only provides for survivorship as indicated, but also provides that transfers occurring under these rights of survivorship are not to be considered testamentary.<sup>55</sup> The code also provides that such rights of survivorship "cannot be changed by will."<sup>56</sup> While the code protects the survivorship rights of the non-contributor as against decedent's heirs, devisees, and legatees, the multi-party account is subject to claims of creditors of the deceased party, including the statutory allowance to the surviving spouse and minor children, taxes, and expenses of administration.<sup>57</sup> However, the right to reach the multi-party account for such purposes is limited to the beneficial interest owned by the decedent just prior to his death. The account may be reached to the extent of decedent's contribution, but only after probate assets have been exhausted, and only to the extent other assets of decedent's estate are insufficient to satisfy such claims.<sup>58</sup> Furthermore, the creditor, surviving spouse, or one acting for a dependent child must make a written demand on the personal representative before the representative may proceed to satisfy claims and expenses out of the account.

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<sup>54</sup>If the account is a trust account, on death of the trustee or the survivor of two [2] or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent; if two [2] or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

*Id.* § 32-4-1.5-4(c).

<sup>55</sup>*Id.* § 32-4-1.5-6.

<sup>56</sup>*Id.* § 32-4-1.5-4(e). Insofar as the trust is concerned, this is contrary to the general rule and the Restatement of Trusts position on the matter. RESTATEMENT (SECOND) OF TRUSTS § 58 (1959).

<sup>57</sup>No multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay claims, taxes, and expenses of administration, including the statutory allowance to the surviving spouse or dependent children, if other assets of the estate are insufficient. A surviving party, P.O.D. payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party shall be liable to account to his personal representative for amounts the decedent owned beneficially immediately before his death to the extent necessary to discharge the claims and charges mentioned above remaining unpaid after application of the decedent's estate. No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a dependent child of the decedent, and no proceeding shall be commenced later than one [1] year following the death of the decedent.

IND. CODE § 32-4-1.5-7 (Burns Supp. 1976) (effective Jan. 1, 1977).

<sup>58</sup>*Id.*; U.P.C. PRACTICE MANUAL, *supra* note 42, § 15.5.

While the new non-probate transfer code provisions are primarily concerned with accounts in financial institutions, there are two provisions which concern the disposition of other kinds of personal property on the death of a party who has an interest therein. Indiana Code section 32-4-1.5-14 covers a variety of written instruments, including insurance policies, contracts of employment, bonds, mortgages, promissory notes, deposit agreements, pension plans, trust agreements, and conveyances or trusts which are deemed to be non-testamentary.<sup>59</sup> Thus a provision in a promissory note that on the death of the payee the note shall be paid to another is to be treated as non-testamentary; the balance is not an asset of the payee's estate, and the note is not required to be executed with formalities of a will. Similarly, a sale of land on contract with a provision that upon death of the vendor the unpaid balance is to be cancelled would be a valid non-testamentary gift.<sup>60</sup> It should be noted that this code provision also permits the decedent to designate either in the instrument or by separate writing the party to whom the money shall be paid or the property shall pass at death. This provision should provide greater flexibility in estate planning, while continuing to protect the interests preserved by formal requirements for testamentary disposition. Furthermore, the rights of creditors are in no way jeopardized.<sup>61</sup>

The last of the new sections provides that household goods acquired during coverture and in possession of both husband and wife become the property of a surviving spouse unless a clear

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<sup>59</sup> Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a contract, gift, conveyance or trust is deemed to be nontestamentary, and this title and title 29 [29-1-1-1—29-2-18-2] do not invalidate the instrument or any provision:

(1) That money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(2) That any money due or to become due under the instrument shall cease to be payable in the event of the death of the promisee or the promisor before payment of demand; or

(3) That any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

IND. CODE § 32-4-1.5-14(a) (Burns Supp. 1976) (effective Jan. 1, 1977).

<sup>60</sup>U.P.C. PRACTICE MANUAL, *supra* note 42, § 15.12.

<sup>61</sup>IND. CODE § 32-4-1.5-14(b) (Burns Supp. 1976) (effective Jan. 1, 1977) provides: "Nothing in this section limits the rights of creditors under other laws of this state."

contrary intention is expressed in a written instrument.<sup>62</sup> This code provision is, unfortunately, much more restrictive in coverage than its predecessor,<sup>63</sup> which included promissory notes, bonds, certificates of deposit, or any other written or printed instrument evidencing an interest in tangible or intangible personal property, including certificates of titles to automobiles. While some of these items are covered in the first fourteen sections, certainly not all of them are. Though there may be omissions, it must be conceded the new code provisions concerning the covered non-probate transfers do provide answers to many of the issues raised by such transfers. Whether other items should be covered is a matter for future legislative determination.

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<sup>62</sup>Personal property, other than an account, which is owned by two [2] or more persons is owned by them as tenants in common unless expressed otherwise in an instrument or written agreement. However, household goods acquired during coverture and in possession of both husband and wife shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument; provided, however, that this shall not create a presumption that the exercise of the right of the surviving spouse to the immediate ownership or possession in enjoyment of such property shall be deemed a transfer taxable under the provisions of [Indiana inheritance and estate tax statutes].

*Id.* § 32-4-1.5-15.

<sup>63</sup>(a) Except as to obligations of the United States government, held jointly or on which there appears the name of surviving co-owner, or as to certain personal property, tangible or intangible, acquired by a husband and wife during coverture, as provided for in subsection (c) of this section, the survivors of persons holding personal property in joint tenancy shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument.

(b) The survivor of persons holding obligations of the United States government either jointly or as coowners shall become the sole owners of such obligations upon death of the joint owner and/or coowner.

(c) Household goods acquired during coverture and in the possession of both husband and wife and any promissory note, bond, certificate of title to a motor vehicle, certificate of deposit or any other written or printed instrument evidencing an interest in tangible or intangible personal property in the name of both husband and wife, shall upon the death of either become the sole property of the surviving spouse unless a clear contrary intention is expressed in a written instrument; Provided, however, that this shall not create a presumption that the exercise of the right of the surviving spouse to the immediate ownership or possession and enjoyment of such property shall be deemed a transfer taxable under the provisions of the [Indiana inheritance and estate tax statutes].

*Id.* § 32-4-1-1 (Burns 1973) (repealed 1975).

## XX. Workmen's Compensation\*

### A. Procedural Aspects

Two recent decisions by the Second District Court of Appeals deal with procedural issues under the Indiana Workmen's Compensation Act.<sup>1</sup>

In *Bagwell v. Chrysler Corporation*,<sup>2</sup> the court retreated from a previous opinion<sup>3</sup> denouncing the "cumbersome procedures and technicalities of pleading,"<sup>4</sup> and relied upon strict construction of the procedural requirements of the Act to deny compensation. Bagwell sustained an injury in the course of employment on September 28, 1965, and was awarded temporary total disability payments at that time. In July 1967 he filed a claim with the Industrial Board for permanent partial impairment, and the Board subsequently ordered additional payment, for 137 weeks, beginning at the date of the accident. Bagwell filed another application in August 1970, alleging recurrence of the disability but no increase in impairment. This application was opposed by the employer as untimely,<sup>5</sup> since it was filed more than one year after the last date for which compensation was paid.<sup>6</sup> The Board

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\*Mark A. Pope

<sup>1</sup>IND. CODE §§ 22-3-2-1 to -21 (Burns 1974).

<sup>2</sup>341 N.E.2d 799 (Ind. Ct. App. 1976).

<sup>3</sup>See *Davis v. Webster*, 136 Ind. App. 286, 198 N.E.2d 883 (1964).

<sup>4</sup>3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 78.10 (1976) [hereinafter cited as LARSON].

<sup>5</sup>IND. CODE § 22-3-3-27 (Burns 1974) provides:

The power and jurisdiction of the industrial board over each case shall be continuing and from time to time, it may, upon its own motion or upon the application of either party, on account of a change in conditions, make such modification or change in the award, ending, lessening, continuing or extending the payments previously awarded, either by agreement or upon hearing, as it may deem just, subject to the maximum and minimum provided for in this act [22-3-2-1—22-3-6-3].

....

The board shall not make any such modification upon its own motion, nor shall any application therefor be filed by either party after the expiration of two [2] years from the last day for which compensation was paid under the original award made either by agreement or upon hearing, except that applications for increased permanent partial impairment are barred unless filed within one [1] year from the last day for which compensation was paid. The board may at any time correct any clerical error in any finding or award.

<sup>6</sup>The final compensation received by Bagwell was on May 2, 1968.

dismissed the application, ruling that the time period of the first temporary total disability award could not be added to that of the permanent partial disability award to bring the application within the statutory period for applications for modifications of awards.<sup>7</sup>

On appeal, Bagwell argued that the one year limitation period which barred him was not applicable, because he was applying for a change in the award to permanent *total disability*, rather than for an increase in permanent *partial impairment* compensation, and thus he *did* qualify under the procedural statute which allows a two year period for filing claims.<sup>8</sup>

The court held that Bagwell failed under both the one and two year limitations, since his application was not filed within two years of the last date for which compensation was paid under the original award; and that the Board acted within its discretion in dating the permanent partial impairment award from the occurrence of the accident, effectively ordering that award to coincide with the original award for temporary total disability.<sup>9</sup>

The court's strict construction of each of Bagwell's applications, rather than consideration of each as notice of a validly asserted claim, appears out of step with the general view. Other state courts have found sufficient notice of application on less evidence, including a letter written by a claimant's doctor to the Industrial Board requesting a change in an award.<sup>10</sup>

In *Scherger Chevrolet Sales, Inc. v. Eubank*,<sup>11</sup> Eubank was injured in a collision with a school bus and subsequently executed a release of claims against the bus driver and the school corporation, signed in the office of his employer, Scherger. Eubank brought an action against the school corporation and the bus driver, and instituted a separate claim against Scherger under the Workmen's Compensation Act, claiming that he had been forced under threat of discharge to sign the release. Eubank also re-

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<sup>7</sup>341 N.E.2d at 801.

<sup>8</sup>IND. CODE § 22-3-3-10 (Burns 1974). A summary of this statute and its application in this case appears in the opinion. 341 N.E.2d at 802.

<sup>9</sup>*Id.* at 803. The court noted that although the Board's usual practice is to date commencement of an award from the initial industrial occurrence, there is no requirement that it do so.

<sup>10</sup>*Beida v. Workmen's Comp. App. Bd.*, 263 Cal. App. 2d 204, 69 Cal. Rptr. 516 (1968). In *Budson Co., Contract 926 v. Oikari*, 270 F. Supp. 611 (N.D. Ill. 1967), a letter sent by the employee's attorney to the employer concerning disability payments was considered a valid claim, on the ground that it was eventually received by the Deputy Commissioner and thus placed the Board on notice that a claim had been asserted.

<sup>11</sup>335 N.E.2d 238 (Ind. Ct. App. 1975).

fused to cash the \$84 check given him as consideration for the release. A one-member Board found that the settlement was valid and that it precluded any workmen's compensation award. However, the Full Industrial Board found that Eubank had not given the release voluntarily and, therefore, the settlement did not preclude an award. From this finding and subsequent remand to the single member Board, Scherger appealed.

The court of appeals dismissed Scherger's brief on the ground that the order which remanded the case to the one-member Board was not a final award and therefore not appealable.<sup>12</sup>

### *B. Employee Conduct and Judicial Review*

Statutory provisions limiting judicial review in workmen's compensation cases were essential factors in three cases decided during the survey period.

In *Gentry v. Jordan*,<sup>13</sup> Mrs. Gentry was denied compensation for the death of her husband, based on a finding that Gentry's accident and subsequent death did not arise out of and in the course of his employment with Jordan.<sup>14</sup> The decedent left work at a service station at approximately 7:30 p.m. Early the next morning he returned, said that his personal auto was disabled, and requested permission to use the service station wrecker. Another employee allowed him to take the wrecker, but warned that Gentry did so on his own responsibility.<sup>15</sup> Later, Gentry was found dead in the wrecker, having crashed into a bridge abutment.

Plaintiff argued on appeal that the accident arose out of activity that was "partly business and partly personal," a contention based on "special errand" and "dual purpose" doctrines.<sup>16</sup> The Industrial Board had found that since decedent's activity was personal and not within his duties at that station, and since he was not being paid for the activity, his death did not arise out of the course of his employment.

The court of appeals, refusing to consider witness credibility or to weigh conflicting evidence, affirmed. Finding substantial probative evidence to support the Board's decision, the court held that application of the doctrines relied on by Gentry on appeal

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<sup>12</sup>*Id.* See IND. CODE § 22-3-4-8 (Burns 1974), which provides for appeals from the decisions by the Full Industrial Board.

<sup>13</sup>337 N.E.2d 530 (Ind. Ct. App. 1975).

<sup>14</sup>The court noted that, although the Board's negative award in this case was based on evidence, a negative award may be supported by an absence of evidence. *Id.* at 532 n.1.

<sup>15</sup>*Id.* at 531.

<sup>16</sup>A comprehensive discussion of the "dual-purpose" doctrine is found in 1 LARSON, *supra* note 3, §§ 18.12-18.24 (1972).



would amount to a hearing de novo. Determining that Mrs. Gentry had failed to carry her burden of proof before the Board, the court concluded that it could reverse only "if reasonable men would have been bound to reach a conclusion contrary to the Board's decision."<sup>17</sup>

In *DeMichaeli & Associates v. Sanders*,<sup>18</sup> employee Sanders was en route to the employer's Indianapolis warehouse from his principal place of employment in Greenfield, Indiana, when he was involved in a fatal car collision. Sanders had been sent by his employer to the warehouse and therefore was clearly within the scope of his employment. However, testimony at the hearing by both the investigating officer and the driver of the other auto that Sanders had failed to stop at a posted stop sign was sufficient to establish an inference that: "[T]he decedent [Sanders] did not stop his vehicle at the posted stop sign at the intersection or, if he did stop, he did not grant the right-of-way to the vehicle driven by Betty L. Estes . . . ."<sup>19</sup>

The Board determined that this inference was insufficient to prove commission of a misdemeanor by Sanders and concluded that defendant had failed to carry the burden of proof that "*this misdemeanor, even if shown, proximately caused the decedent's death.*"<sup>20</sup>

The court of appeals reversed, commenting:

The Board's findings are remarkable. Reading them one is reminded of a trained horse who has methodically cleared each jump in the obstacle course and would logically be expected to sail over the last easy hurdle, but suddenly veers off on a frolic of his own.<sup>21</sup>

The court acknowledged that the statute explicitly places the burden of proof of misconduct precluding compensation on the defendant.<sup>22</sup> Finding that the employer had sustained that burden,

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<sup>17</sup>337 N.E.2d at 532.

<sup>18</sup>340 N.E.2d 796 (Ind. Ct. App. 1976), also discussed in Shaffer, *Administrative Law*, *supra* at 41.

<sup>19</sup>340 N.E.2d at 800 (court's emphasis).

<sup>20</sup>*Id.* (court's emphasis).

<sup>21</sup>*Id.* at 801. The court, varying the metaphor, found the Board's conclusion "too fast a horse for us to ride."

<sup>22</sup>IND. CODE § 22-3-2-8 (Burns 1971) states in pertinent part:

No compensation shall be allowed for any injury or death due to the employee's intentionally self-inflicted injury, his intoxication, his commission of a felony or misdemeanor . . . or his wilful failure or refusal to perform any statutory duty. The burden of proof shall be on the defendant.

See also B. SMALL, WORKMEN'S COMPENSATION LAW OF INDIANA § 11.1 (1950).

since the only reasonable conclusion from the evidence was that decedent's death was proximately caused by his commission of a misdemeanor, the court determined as a matter of law that compensation should be denied.<sup>23</sup>

Judge White concurred in the majority opinion that decedent's failure to stop was a misdemeanor and proximately caused his death, but dissented from that portion of the decision denying compensation. He found that the statute was intended to deny compensation only for acts of willful misconduct and, since the act committed by Sanders was mere negligence, compensation should be allowed.<sup>24</sup>

In *Board of Commissioners v. Dudley*,<sup>25</sup> the Industrial Board awarded compensation to Dudley for injuries received during the course of his employment in a two-truck collision. The case turned on the cause of the collision: the employee argued a defect in his truck's mechanism;<sup>26</sup> the employer argued intoxication on the employee's part. The Full Board awarded compensation after hearing evidence that a blood sample taken from the employee while he was unconscious immediately after the accident indicated that he was intoxicated. The court of appeals on first hearing reversed, citing *DeMichaeli* and holding that the only possible inference from the evidence before the Board was that Dudley was intoxicated and that the intoxication was the proximate cause of the accident.<sup>27</sup> Judge White, concurring and dissenting, noted that

Dean Small adds that for misconduct to preclude an award, that misconduct must be the proximate cause of the accident for which an award is sought.

<sup>23</sup>The only reasonable inference supportable by the Board's findings and the evidence, leads inescapably to the conclusion that the Decedent's death was due to his commission of a misdemeanor in failing to stop or yield the right of way . . . .

. . . .

Therefore, as reasonable men could *only* conclude that the Decedent's death was proximately caused by his commission of a misdemeanor the question is one of law, and compensation should be denied and the Board's decision must be reversed.

340 N.E.2d at 805-06 (court's emphasis).

<sup>24</sup>*Id.* at 806-07. Professor Larson appears to disagree with Judge White's view of the statute: "There is therefore no occasion to distinguish between negligent fault and willful fault, since fault itself can have no bearing on the process of drawing the boundaries of compensability." See generally 1A LARSON, *supra* note 3, §§ 30.10-30.20 (1973).

<sup>25</sup>344 N.E.2d 853 (Ind. Ct. App. 1976), also discussed in Shaffer, *Administrative Law*, *supra* at 41.

<sup>26</sup>Dudley had received notice from General Motors that his truck might be defective. Evidence at the hearing indicated, however, that this defect was not applicable to Dudley's vehicle.

<sup>27</sup>340 N.E.2d at 808.

the Board had made no findings of fact, but had merely recited the stipulated evidence.<sup>28</sup>

On rehearing Judge Sullivan joined with Judge White to reverse the Board and remand for a finding of facts and entry of an award based on those facts.

Judge Buchanan dissented, contending that the Board's original findings clearly implied that Dudley was intoxicated. He cited *DeMichaeli* and the original court of appeals opinion, concluding that the evidence could support only one reasonable decision, a decision which the Board did not reach.<sup>29</sup>

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<sup>28</sup>*Id.* at 815-16.

<sup>29</sup>Judicial review of workmen's compensation awards is confined to questions of law, as in any appeal. However, recent cases indicate a tendency to review the facts established by the Board, and to reverse on the basis of that reconsideration. Appellate court review of Industrial Board awards is discussed in 3 LARSON, *supra* note 3, §§ 80.00-80.50 (1976).

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